Memorandum 94-19

Administrative Adjudication: Comments on Tentative Recommendation

The Commission reviewed comments on the Tentative Recommendation on administrative adjudication at the September 1993 and February 1994 meetings. This memorandum picks up where we left off.

Memorandum 94-18 proposes to restructure the draft statute and to renumber some sections. This memorandum refers to the sections as renumbered, showing the old section numbers in brackets.

Attached as an Exhibit are the letters referred to in this memorandum. For pages 1-191, the pagination is the same as the Exhibits to Memorandum 93-45 and First Supplement. Pages 199-229 were received after that memorandum and supplement were issued. As shown below, we omit letters that are exemption requests without comments on specific sections. We include letters from, and discuss points raised by, agencies we tentatively decided to exempt from the new APA if the point addresses the merits of particular provisions.

Pacific Gas and Electric Company	91-93
Department of Insurance	94-96
Ofc. Statewide Health Plng & Dvlpmt **[omitted]**	97-99
Office of Administrative Law	100-103
Alcoholic Bev'ge Control Appeals B'd (8/31/93)	104-105
Coastal Commission (Exec. Director) **[omitted]**	106-107
State Personnel Board	108-117
Energy Commission	118-126
Coastal Commission (Chief Counsel) **[omitted]**	127-130
Department of Social Services (9/1/93)	131-142
State Bar Committee on Administration of Justice	143-153
State Bar Litigation Section	155-175
Agricultural Labor Relations Board **[omitted]**	176-186
Professor Michael Asimow **[omitted]**	187-191
ABCAB (9/14/93) **[omitted]**	192-194
Public Employment Relations Board (9/23/93)	195-198
State Personnel Board	199
Dep't of Social Services (10/6/93) **[omitted]**	200-202
California Public Employees' Retirement System	203-208
Dale E. Wood, attorney	209-210
Department of Motor Vehicles	211-212
Richard A. Hutton, attorney	213-219
Ed Kuwatch, attorney	220-227
Henry P. Rupp III, attorney	228-229

The comments are discussed below. Discussion of a significant policy issue for Commission determination is preceded by a dot [•].

§ 614.020. Presiding officer [formerly § 614.120]

The **State Water Resources Control Board** says it may be more appropriate for the agency head than the presiding officer to obtain a successor presiding officer for a converted proceeding. Exhibit p. 83. The staff agrees, and would revise Section 614.020 as follows:

> 614.020. If the presiding officer or other agency official responsible for the original proceeding would not have authority over the new proceeding to which it is to be converted, the ~~officer~~

~~or official~~ agency head shall ~~secure the appointment of~~ appoint a successor to preside over or be responsible for the new proceeding.

§ 614.050. Agency regulations [formerly § 614.150]

The **Department of Insurance** says adoption of regulations on conversion will be difficult, since the determination of whether a person is prejudiced is made on a case by case basis. Exhibit p. 94. "Nevertheless, regulations may at least provide some guidance as to when conversion is appropriate." The staff agrees with these observations, and can suggest no improvements in this section.

§ 631.030. When adjudicative proceeding not required [formerly § 641.120]

The **Department of Health Services** says by exempting investigatory proceedings and a few other kinds of agency decisions from the Administrative Procedure Act, this section may imply that all other hearings are subject to the APA. Exhibit p. 16. The staff believes this problem is solved by revised language in Section 631.010 and the revised Comment to that section approved by the Commission at the last meeting. Section 631.010 now makes clear the APA must apply only where the federal or state constitution or a statute requires an evidentiary hearing for determination of facts. This is fleshed out by the Comment to Section 631.010. We would point out the interrelation of these two sections in the Comment to Section 631.030.

§ 632.020. When informal hearing may be used [formerly § 647.110]

The **State Bar Committee on Administration of Justice** supports the proposed new informal [formerly conference] hearing. Exhibit p. 151.

Section 632.020 permits the informal hearing in minor matters, including a "disciplinary sanction against a licensee that does not involve revocation, suspension, annulment, withdrawal, or amendment of a license." The **Department of Social Services** is concerned this provision may impliedly give a right to a hearing in all such cases. Exhibit p. 139. But it seems clear from Section 632.020 and Comment that the section is permissive, not mandatory. The question of when an adjudicative proceeding is required under the draft statute is determined by Section 631.010: An APA proceeding is required "if, under the federal or state constitution or a statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision." We would add a cross-reference to this provision in the Comment.

Professor Asimow passes on a suggestion by Dan Siegel of the Attorney General's Office that an informal hearing be authorized when a new case holds due process requires a hearing in a situation the agency did not anticipate by regulation. The staff thinks this is a good suggestion, and would add a new subdivision (d) to Section 632.020:

> 632.020. An informal hearing procedure may be used in any of the following proceedings:
>
> . . . .
>
> (d) A proceeding where a judicial decision holds that due process of law requires a hearing, if its use does not violate the federal or state constitution and not more than one year has elapsed since the decision.

The Comment would say the one-year limitation is to give the agency time to adopt a regulation providing for an informal hearing pursuant to the judicial decision.

The **State Personnel Board** wants to keep its authority in minor disciplinary matters under Government Code Section 19576 to "make an investigation with or without a hearing as it deems necessary." Exhibit p. 113. The staff agrees, and would cross-refer in the Comment to Section 631.030 (when adjudicative proceeding not required).

§ 634.010. Agency regulation required [formerly § 641.310]

The **Unemployment Insurance Appeals Board** says it is unclear how the emergency decision provisions would apply to it. The Board asks whether these provisions are nevertheless required to be implemented, whether regulations must be adopted to make these provisions inapplicable, or whether they may simply be ignored. Exhibit p. 37. It seems clear under Section 634.010 that the agency may issue an emergency decision only if it "has adopted a regulation that makes this chapter applicable." Without such a regulation, the chapter does not apply. Moreover, the agency may select the procedure it uses. Section 631.020 (applicable procedure). We will point this out in the Comment.

Section 634.010 permits an agency to apply the emergency decision "chapter" by regulation, imposes requirements on the contents of the regulation, and says this "section" does not apply to an emergency decision issued under other statutory authority. The **Public Utilities Commission** would say the "chapter" does not apply to an emergency decision issued under other statutory authority,

rather than the "section" does not apply. Exhibit p. 50. The staff agrees, and would change "section" to "chapter" in subdivision (c) of Section 634.010. We would note in the Comment that, notwithstanding Sections 634.010-634.080, a statute on emergency decisions applicable to a particular agency or proceeding prevails over these provisions, citing Section 612.140.

The **State Bar Litigation Section** says the authority for agencies to issue regulations defining when an emergency decision may be issued under this chapter, and prescribing procedures and the nature of the relief, undercuts the goal of uniformity among agencies. Exhibit p. 163. The staff believes that, because of the wide variety in function and purpose of agencies to which the new APA will apply, it is best left to the agencies to define the circumstances under which emergency relief will be available and what relief may be granted. The statute does have provisions that cannot be varied by regulation (emergency decision available where immediate danger to public health, safety, or welfare; emergency decision only for temporary, interim relief; there must be notice and an opportunity to be heard; emergency decision must state factual basis and reasons; adjudicative proceeding must be commenced within ten days; administrative and judicial review of emergency decision available).

The **Department of Social Services** wants to keep its provisions for temporary suspension orders, and to ensure they are not superseded by the emergency decision provisions. Exhibit p. 136. The staff agrees, and will preserve these special statutes in the conforming revisions. In other respects, the Department approves Section 635.010.

§ 634.020. When emergency decision available [formerly § 641.320]

• Section 634.020 permits "temporary, interim relief" where there is "an immediate danger to the public health, safety, or welfare that requires immediate agency action." The **State Water Resources Control Board** says this is too narrow, and should be expanded to allow for "interim relief to prevent irreparable harm pending the outcome of administrative proceedings," analogous to a preliminary injunction in judicial proceedings. Exhibit pp. 83-84. The "immediate danger" standard is based on the need for prompt action. Of the other statutes authorizing interim relief, only one requires urgency as a basis for the action. Pub. Util. Code § 1070.5 (interim suspension of trucking license for "imminent danger to public safety"). The rest do not include urgency as a basis for the action. See, e.g., Bus. & Prof. Code §§ 494 (interim license suspension for

conduct that would "endanger the public health, safety, or welfare"), 6007(c) (attorney's conduct poses "substantial threat of harm"), § 10086(a) (desist order to real estate licensee for illegal conduct); Gov't Code § 11529 (interim order suspending medical license if "serious injury" to public would result); Health & Safety Code §§ 1550, 1569.50 (temporary suspension of residential care facility license for "substantial threat to health or safety"), 1596.886 (same for day care license); Veh. Code § 11706 (temporary suspension of dealer's license if "required in the public interest"). We could adopt the suggestion of the Water Board by revising Section 634.020 as follows:

> 634.020. (a) An agency may issue an emergency decision under this chapter in a situation involving an immediate danger, or a likelihood of irreparable harm, to the public health, safety, or welfare that requires immediate agency action.
>
> (b) An agency may take only action under this chapter that is necessary to prevent or avoid the immediate danger or irreparable harm to the public health, safety, or welfare that justifies issuance of an emergency decision.
>
> (c) . . . .

The **State Water Resources Control Board** says the provision for an emergency decision to avoid danger to public health, safety, or welfare should include adverse effects on the environment, particularly to fish and wildlife. Exhibit p. 84. The staff agrees and would add the following to the Comment:

> The authority for an emergency decision to avoid immediate danger to the public health, safety, or welfare includes avoiding adverse effects on the environment, such as to fish and wildlife.

• The **State Bar Litigation Section** believes existing statutes giving emergency powers to specific agencies are sufficient, and would not generalize this power to apply to all agencies. Exhibit. p. 165. But these provisions will not apply unless the agency makes them applicable by regulation, which will afford an opportunity for public comment.

The **State Bar Litigation Section** says the provision for an emergency decision where there is danger to the public "welfare" is too broad, and gives agencies unlimited discretion to issue emergency decisions in circumstances that may not warrant it. Exhibit pp. 163-164. But public "welfare" is an accepted term: It is used in the 1981 Model State APA and in several California statutes that authorize emergency decisions. See, e.g., Gov't Code § 11529; Health &

Safety Code §§ 1550, 1569.50; see also Veh. Code § 11706 (public "interest"). The staff thinks public "welfare" is no more vague or broad than public "health," public "safety," or public "interest." Protection is built into the statute by making an emergency decision subject to immediate administrative or judicial review, and by requiring the emergency decision to be followed immediately by an adjudicatory proceeding.

• The **State Bar Litigation Section** is also concerned there are no specific and substantial evidentiary burdens for an emergency decision as there are for a temporary restraining order. Exhibit p. 164. But Section 648.310 (discussed below) requires clear and convincing proof to revoke or suspend an occupational license unless by regulation the agency provides a different burden. This would apply to an emergency decision to suspend an occupational license. See also Gov't Code § 11529; 1993 Cal. Stat. ch. 1267, § 58 (interim order suspending medical license requires clear and convincing proof and showing of reasonable probability agency will prevail in underlying proceeding). The staff believes the requirement that emergency action may be taken only avoid "immediate danger to the public health, safety, or welfare," plus the requirement of clear and convincing proof for interim suspension of an occupational license, is sufficient protection.

§ 634.030. Emergency decision procedure [formerly § 641.330]

The **State Bar Litigation Section** says the provision for notice "if practicable" affords too easy an avenue of escape from the notice requirement. Exhibit p. 164. The "if practicable" language comes from the 1981 Model State APA. There is also authority for this language in existing California statutes. For example, under Government Code Section 11529, a medical license may be suspended without notice if "serious injury would result to the public before the matter can be heard on notice." Other statutes permit temporary license suspension without notice, but require an early hearing. See, e.g., Bus. & Prof. Code § 6007(c) (attorney); Health & Safety Code §§ 1550.5, 1569.50, 1596.886 (health facilities and day care centers); Pub. Util. Code § 1070.5 (trucking license); Veh. Code § 11706 (DMV license suspension). We could replace the requirement of notice "if practicable" with a requirement of notice "unless serious injury would result to the public before the matter can be heard on notice." But the staff is inclined to keep the "if practicable" language because it is consistent with the Model State APA and with other California statutes.

§ 634.040. Emergency decision [formerly § 641.340]

The **Department of Health Services** says this section is too restrictive in providing that an emergency decision is effective when issued. Exhibit pp. 16-17. In many cases it is necessary that an emergency decision have a phase-in, e.g., to prevent harm to patients in a nursing facility whose license is being suspended. The staff agrees, and would broaden subdivision (b) to allow the agency to specify the effective date:

> (b) The agency shall give notice to the extent practicable to the person to which the agency action is directed. The emergency decision is effective when issued or as provided in the decision.

§ 634.050. Completion of proceedings [formerly § 641.350]

The **Department of Health Services** says Section 634.050 may require the agency to hold a full APA hearing within 10 days after issuance of an emergency decision, a practical impossibility. Exhibit pp. 17-18. But the section only requires the agency to "commence an adjudicative proceeding" within 10 days. An adjudicative proceeding is commenced by issuance of an agency pleading. Section 642.310. Thus it is clear that the pleading must be issued within 10 days, not that the hearing be conducted within that time. We could add the following to the Comment:

> Subdivision (b) requires the agency to commence an adjudicative proceeding within 10 days after the emergency decision. This is done by issuance of an agency pleading. Section 642.310.

The **Department of Social Services** approves Section 634.050. Exhibit p. 136.

§ 634.060. Agency record [formerly § 641.360]

• The **State Bar Litigation Section** is concerned about the provision that, "[u]nless otherwise required by regulation, statute, or federal or state constitution, the agency record need not constitute the exclusive basis for an emergency decision or for administrative or judicial review of an emergency decision under this article." Exhibit p. 164. Although this provision comes from the 1981 Model State APA, it is troubling. The State Bar Section appears to have a point when it says this provision makes review impossible and gives agencies apparently limitless discretion. Although additional evidence may be taken during administrative or judicial review, it seems likely that upon administrative

review, the agency will tend to uphold the emergency decision. Is it a sufficient answer that the agency must commence an adjudicative proceeding within ten days after the emergency decision, and that many California statutes authorize temporary measures such as a license suspension with no notice whatever? The staff is inclined to delete the provision that the record need not constitute the exclusive basis for an emergency decision.

§ 634.070. Agency review [formerly § 641.370]

The **Department of Health Services** suggests this section be deleted. It provides for review by the agency head of an emergency decision. Exhibit pp. 18-19. The Department says the agency head is usually involved in authorizing the emergency decision to begin with, and it is unlikely that it will reverse itself without regular hearing procedures. They also indicate mechanical problems with the provision — it provides too little time for review (15 days) in light of scheduling problems for the agency head, the record for review may not be useful, and it makes little sense to have the agency head reviewing the emergency decision at the same time the agency is holding a hearing to confirm it.

The **State Water Resources Control Board** and the **California Energy Commission** say 15 days for agency review of an emergency decision is too short for notice to interested parties. Exhibit pp. 84, 123.

• The staff thinks Section 634.070 does not provide a useful remedy in light of the expedited agency hearing procedure in Section 634.060 and the availability of immediate judicial review under Section 634.080. The staff would delete Section 634.070.

§ 634.080. Judicial review [formerly § 641.380]

The **California Energy Commission** says the requirement the court hearing on judicial review of an emergency decision be held within 15 days after service of the petition on the agency is too short, especially for multi-member boards and commissions. Exhibit p. 123. CEC says it must conduct business in public meetings, and the Open Meetings Act requires at least ten days notice of such meetings. But the Open Meetings Act permits a closed session "to deliberate on a decision to be reached based upon evidence introduced" in an APA proceeding. Gov't Code 11126(d). Moreover, it is not clear why further agency deliberation is needed to respond to a petition for judicial review of an emergency decision. It

would seem the deliberations are complete when the decision to take emergency action is made, and that thereafter it is the duty of staff to support the action without the need for further reference to the agency's governing board. Finally, the 15-day time limit does not seem unreasonable in light of the 15 to 20 day time limit for a court hearing on an order to show cause with a temporary restraining order under Section 527 of the Code of Civil Procedure.

§§ 635.010-635.060. Declaratory decision generally [formerly §§ 641.210-641.260]

The **Department of Social Services** supports the article on declaratory decisions. Exhibit p. 135.

The **State Bar Litigation Section** thinks the article on declaratory decisions "should be completely rethought." Exhibit pp. 157-161. The State Bar Section had the following concerns:

(1) The State Bar Section says the provision in Section 635.060 for an agency by regulation to modify or make inapplicable the declaratory decision provisions undercuts goal of uniformity. But agencies should have broad discretion to determine whether and when declaratory relief will be available. In civil practice, there has traditionally been hostility to advisory opinions. 3 B. Witkin, California Procedure *Actions* § 48, at 79 (3d ed. 1985). The agency's mission will have a crucial bearing on the need for declaratory decisions. The draft statute appears to strike an appropriate balance between uniformity as expressed in the authority for OAH to adopt model regulations and the ability of an agency to opt out as it considers necessary.

(2) The State Bar Section says the statute should require an applicant for a declaratory decision to "identify all persons who might be affected" by the decision and should limit the effect of the decision only to such parties. The problem with this is that it may be difficult to determine who such persons are, because the concept of who is entitled to notice is flexible depending on the interests involved. A civil judgment for declaratory relief is binding on the parties, but is not binding in a new action with different parties. 7 B. Witkin, California Procedure *Judgment* § 220, at 657 (3d ed. 1985). The same rule should apply in administrative proceedings. But Section 635.010 appears to do this by preventing an agency from issuing a declaratory decision if it would "substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing." And Section 635.030 permits a person

whose legal rights may be substantially affected to intervene. These provisions seem sufficient.

(3) The State Bar Section would make clear that declaratory relief may not be sought in the form of a class action. It already appears to be the law that, in the absence of an express statutory provision affording class relief, class relief is not available in administrative proceedings. *Cf.* Ramos v. County of Madera, 4 Cal. 3d 685, 690, 484 P.2d 93, 94 Cal. Rptr. 421 (1971); *but see* California Administrative Hearing Practice § 4.71 (Cal. Cont. Ed. Bar 1984) (exhaustion of remedies doctrine does not bar class action for declaratory relief).

The **Public Employment Relations Board** says that, while these provisions "may be appropriate for other administrative agencies, it runs contrary to the scheme of collective bargaining that PERB oversees." Exhibit p. 197. But these provisions merely give agencies discretion to issue a declaratory decision (Sections 635.010, 635.040), and the agency may by regulation modify these provisions or make them inapplicable. Section 635.060(c).

§ 635.010. Declaratory decision permissive [formerly § 641.220]

The **California Energy Commission** would make clear that agencies may not only make declaratory decisions on matters "within the primary jurisdiction of the agency," but also on whether the agency has jurisdiction. Exhibit p. 123. This seems too obvious to require codification, but the staff would add the following to the Comment:

> Under subdivision (a), a declaratory decision may determine whether the subject of the proceeding is or is not within the agency's primary jurisdiction. See Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 302-303, 109 P.2d 942 (1941); United Insurance Co. v. Maloney, 127 Cal. App. 2d 155, 157-58, 273 P.2d 579 (1954).

The **State Bar Litigation Section** says standards should be included to determine who is a necessary or indispensable party under Section 635.010. Exhibit p. 159. The staff would add the following to the Comment:

> A necessary party is one that is constitutionally entitled to notice and an opportunity to be heard — a flexible concept depending on the nature of the competing interests involved. Horn v. County of Ventura, 24 Cal. 3d 605, 612, 617, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979).

§ 635.020. Notice of application [formerly § 641.230]

The **State Bar Litigation Section** says the provision in Section 635.020 for notice of an application for a declaratory decision to "persons to whom notice of an adjudicative proceeding is otherwise required" should be clarified. Exhibit p. 159. The staff would add the following to the Comment:

> For persons to whom notice of an adjudicative proceeding is otherwise required, see Sections 642.340.

The **State Bar Litigation Section** says the statute should require all persons who may be affected by a declaratory decision to receive notice of the proceeding and of their right to intervene. Exhibit pp. 159. The staff agrees and would revise Section 635.020 as follows:

> 635.020. Within 30 days after receipt of an application for a declaratory decision, an agency shall give notice of the application, and of the right to intervene, to all persons to which notice of an adjudicative proceeding is otherwise required, and may give notice to any other person.

The Comment would note that the right to intervene is given by Section 635.030.

§ 635.030. Applicability of rules governing administrative adjudication [formerly § 641.130]

The **State Bar Litigation Section** says the statute should make clear an intervenor in proceedings for a declaratory decision may contest the original applicant's version of the facts, and may present evidence and argument and cross-examine witnesses. Exhibit pp. 160-61. Section 644.120 already implies that an intervenor may present evidence and argument and engage in cross-examination, because the section permits the presiding officer to require two or more intervenors to "combine their presentations of evidence and argument" and to limit cross-examination. This is consistent with civil practice under which a declaratory decision may be issued on contested facts. See 5 B. Witkin, California Procedure *Pleading* §§ 811, 813, at 254-56 (3d ed. 1985). An action for declaratory relief is to be distinguished from submission of a controversy on an agreed statement of facts. See 3 B. Witkin, California Procedure *Actions* § 48. at 79 (3d ed. 1985). So the declaratory relief sections seem sufficient.

§ 635.060. Regulations governing declaratory decision [formerly § 641.210]

The **State Bar Litigation Section** would not permit agencies to vary by regulation the declaratory decision procedures, but would make model regulations adopted by the OAH binding on all agencies in the interest of uniformity. The staff is opposed to this suggestion because the declaratory decision procedures are optional with the agency. If the agency can completely eliminate such procedures, it follows that the agency should be able to craft procedures appropriate to its function.

The **Unemployment Insurance Appeals Board** says it is unclear whether they must follow the declaratory decision provisions, must adopt regulations saying they are inapplicable, or may simply ignore them. Exhibit p. 37. The statute makes clear model regulations adopted by OAH will apply unless the agency adopts its own regulations. The regulations may modify these provisions or may make them inapplicable. Section 635.060.

The **Water Resources Control Board** says the provisions for declaratory decision assume they will be limited to cases where the facts are not in dispute, and that the statute should permit factual determinations in appropriate cases. Exhibit p. 83. The preliminary part of the recommendation supports this view: In the declaratory decision procedure, "there is no fact-finding involved — only application of laws or regulations to a prescribed set of facts." Section 635.010 permits a person to seek a declaratory decision as to the "applicability to specified circumstances" of a statute, regulation, or decision. And Section 635.050 says a declaratory decision shall contain "the particular facts on which it is based." But there is nothing in the statute requiring the presiding officer to accept the applicant's statement of facts if there is contrary proof. So the staff would delete the quoted statement from the preliminary part. If the Board determines that other procedural provisions of the new APA should apply to its fact-finding in declaratory proceedings, it may so provide by regulation. Section 635.030.

§ 636.110. Office of Administrative Hearings [formerly § 641.410]

• The **Association of California State Attorneys and Administrative Law Judges** suggests that the Office of Administrative Hearings be renamed the Administrative Law Court, and the Director be renamed the Chief Administrative Law Judge. Exhibit pp. 1-3. ACSA says this would help the appearance of impartiality to have proceedings before a court rather than before

a bureaucratic office of the Department of General Services. While the staff is not opposed in theory to this concept, we are concerned about the implications for other agencies that have their own administrative law judges. By implication, hearings before those agencies would have an inferior status since they would not be before the Administrative Law Court. One solution could be to name the hearing division of each agency the Administrative Law Court of that agency.

§ 636.130. Administrative law judges [formerly § 641.430]

Section 636.130 continues a provision in existing Section 11502 to require an ALJ of OAH to have been admitted to law practice for at least five years, and to authorize the State Personnel Board to establish additional qualifications. The **Office of Administrative Law** wants to change existing law by saying the additional qualifications must be established by regulations adopted under rule-making provisions of the APA. Exhibit p. 102. This is currently being litigated, and the staff thinks it would be inappropriate for the Commission to take a position on it.

§ 636.150. Assignment of administrative law judges [formerly § 641.450]

Section 636.150 requires APA hearings to be conducted by an ALJ of OAH unless a statute exempts the agency from this requirement. The **State Board of Control** would reverse this presumption to say instead that hearings shall be conducted by an ALJ of OAH if a statute specifically so requires. Exhibit p. 45. The Board is concerned about the effect of Section 641.450 on its statute, Government Code Section 13908, permitting it to conduct hearings without using an ALJ from OAH. The staff would address this by adding new Government Code Section 13908.5 to the Board's statute:

> 13908.5. An adjudicative proceeding of the board pursuant to this part is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

§ 636.180. Study of administrative adjudication [formerly § 641.480]

The **Office of Administrative Law** asks why the Comment cites Section 610.190 which defines "agency." Exhibit p. 103. This is because Section 636.180 continues Government Code Section 11370.5 which refers to "departments, agencies, officers and employees of the State." Section 636.180 substitutes "agency" for the longer phrase. "Agency" is defined in Section 610.190 to

include departments, officers, and employees, so a reference to the definition in the Comment to Section 636.180 seems useful.

§ 641.120. Modification or inapplicability of statute by regulation [formerly § 641.130]

Section 641.120 says if another section permits agencies by regulation to modify or make inapplicable certain APA provisions, the regulations must be adopted under rule-making provisions of the APA, including review by the Office of Administrative Law. The **State Personnel Board** wonders if its existing regulations may suffice as authorized modifications to the new APA. Exhibit p. 109. The restructured statute provides a simplified procedure for agencies to adopt the new agency procedure for hearings that need not be conducted by an administrative law judge from the Office of Administrative Hearings. The agency may rely on existing regulations if it adopts a new regulation that identifies existing regulations or incorporates formal hearing provisions that satisfy key due process requirements of the statute. The new regulation will not require OAL review. This should largely address the Board's concern.

The **State Personnel Board** also observes its existing statutes would arguably remain intact. *Id.* At the last meeting, the Commission decided not to eliminate nonconforming statutes of particular agencies without a statute-by-statute analysis. The staff tentatively concluded that only a few conforming revisions in the State Personnel Board statutes need to be made — they should not be repealed wholesale.

The **State Bar Litigation Section** says the ability of agencies to vary or opt out of APA provisions by regulation undercuts the goal of achieving procedural uniformity and is "contrary to the public interest." Exhibit p. 157. This is consistent with the view of the **California School Employees Association** (Exhibit p. 79), but the **State Board of Control** thinks the authority to vary or opt out of the APA should be broadened (Exhibit p. 46). The restructured statute recognizes the futility of trying to impose one model on all agencies, and thus allows an agency either to use the formal hearing procedure of the APA, or to use its own procedure specified by regulation and tailored to its own needs but consistent with due process. The staff thinks this is the best achievable compromise.

§ 641.130. Compilation of regulations governing adjudicative proceeding [formerly § 641.140]

• Section 641.130 requires regulations on the agency's adjudicative proceedings be compiled in one title of the California Code of Regulations on administrative procedure, and authorizes the agency to duplicate these provisions in a title that includes other regulations of the agency if applicable regulations adopted by the Office of Administrative Hearings are duplicated with them or cross-referenced by them. The **Water Resources Control Board** says it is "neither necessary nor desirable" to have all agency procedural regulations compiled in one volume of the California Code of Regulations. Exhibit p. 83. The Board says that separating procedural from substantive regulations will make it more difficult for users, and printing the regulations both in the APA title and in the agency's own regulations will increase costs to subscribers. Does the Commission wish to reconsider this?

§ 642.210. Initiation by agency

The **California Energy Commission** would make clear in Section 642.210 that an agency may initiate an adjudicative proceeding to determine whether it has jurisdiction in a particular matter. Exhibit p. 123. CEC must frequently initiate actions to determine whether a project such as siting of a power facility is subject to its jurisdiction. CEC has jurisdiction over power plants of 50 megawatts and greater. An application to CEC to determine whether it has jurisdiction may be made by the power plant or by a member of the public. Under existing law, an agency may determine its own jurisdiction. See Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 302-303, 109 P.2d 942 (1941); United Insurance Co. v. Maloney, 127 Cal. App. 2d 155, 157-58, 273 P.2d 579 (1954); see also Gov't Code § 11506 (respondent may object to accusation on ground "it does not state acts or omissions on which the agency may proceed"). The staff would make clear we have not changed existing law by adding the following to the Comment (this is consistent with the staff recommendation under Section 635.010, *supra*, on declaratory decisions):

> The authority in Section 642.210 for the agency to initiate an adjudicative proceeding with respect to a matter within its jurisdiction includes authority for the agency to initiate a proceeding to determine whether it has jurisdiction in the matter.

§ 642.220. Application for decision

Subdivision (a) of this section says any person may apply to an agency for a decision. The **Department of Health Services** and the **State Water Resources Control Board** are concerned about this subdivision. Exhibit pp. 19, 84. DHS says the subdivision is meaningless and could cause problems. It also duplicates part of the introductory clause of Section 642.230, which provides for commencement of an adjudicative proceeding "on application of a person for an agency decision." The staff would delete subdivision (a) from Section 642.220.

Subdivision (b) says an application for a decision includes a request for an appropriate adjudicative proceeding. The **Department of Health Services** and the **California Public Employees' Retirement System** are concerned about this provision. Exhibit pp. 19-20, 204-205. DHS says it raises more questions than it answers. DHS prefers to require an agency, when it takes action or receives a request that creates an entitlement to a hearing, to give notice to the affected party of how to request a hearing and the time period within which the request must be made. PERS says the subdivision might mean a hearing is required on all retirement applications. Subdivision (b) is drawn from the 1981 Model State APA. The Comment says its purpose is to ensure a person who asks for an agency decision but does not expressly ask for an adjudicative proceeding does not thereby waive the right to such a proceeding. This protection may be especially important for unrepresented parties. The staff would delete Section 642.220, and add a provision to Section 642.230 (agency action on application) to address this problem:

> A person who makes an application for an agency decision without expressly requesting an adjudicative proceeding does not thereby waive the right to an adjudicative proceeding.

§ 642.230. Agency action on application

The **Department of Health Services** says Section 642.230 may permit a third-party with no substantial interest in the matter to request a hearing, despite the Commission's stated intent not to do this. Exhibit p. 20. The **Department of Social Services** and **California Public Employees' Retirement System** have similar concerns. Exhibit pp. 136, 204. The staff would address this by revising the introductory clause of Section 642.230 as follows:

> 642.230. An agency shall commence an adjudicative proceeding on application of a person for an agency decision ~~for which~~ if a

hearing is required by Section 631.010 (application to constitutionally and statutorily required hearings) and the applicant is a person entitled to the hearing, unless . . . .

The **Department of Social Services** would reverse the presumption to say no hearing is required unless provided by statute. Exhibit p. 136. But this is precisely the effect of Section 642.230, which requires the agency to commence an adjudicative proceeding when required by Section 631.010. The latter section has been redrafted to say the APA governs an agency decision "if, under the federal or state constitution or a statute, an evidentiary hearing for determination of facts is required," and this is referred to in the Comment to Section 642.230. This, and the limiting language suggested above, should solve this problem.

§ 642.240. Time for agency action

• Section 642.240 requires an agency to respond to an application for agency action within 90 days. The **Department of Health Services** wonders how this will work for a license application. Exhibit pp. 20-21. If the process takes longer than 90 days, is the agency deprived of jurisdiction? Must the applicant refile and pay another fee? DHS has other concerns about the operation of the provision as well, and suggests it should not apply to license applications, but only to a hearing request after denial of a license. The Commission did intend to impose a duty on agencies to act after a request for a license. But the Commission recognized some applications may require more time, so Section 642.240 is expressly made subject to time limits established by another statute. The staff thinks the provision is satisfactory as drafted.

The **Department of Real Estate** notes that three of its statutory provisions call for accelerated hearings (hearings within 20 or 30 days after demand, rather than 90 days as provided in this section). Exhibit p. 5. These three provisions apply where there has been an administrative restraining order or other action that shuts down operations, and an accelerated hearing is appropriate. The staff would preserve these as exceptions to Section 642.240. Two of the provisions are already noted in the Comment to the section.

Section 642.240(c) requires the agency to "commence" an adjudicative proceeding within 90 days after the application or response. The **Department of Insurance** asks what is meant by "commence." Exhibit pp. 94-95. We will clarify this by adding the following to the Comment:

> An agency commences an adjudicative proceeding under subdivision (c)(2) by issuing an agency pleading. Section 642.310.

The **State Personnel Board** says the 90-day requirement in Section 642.240 to commence an adjudicative proceeding conflicts with the Board's own statute, Government Code Section 18671.1, which says the "period from the filing of the petition to the decision of the board shall not exceed six months or 90 days from the time of the submission, whichever time period is less." Exhibit pp. 110-111. There is a conflict, but the conflict is with proposed Section 649.110 which requires a final decision within 100 days after the case is submitted or other time provided by agency regulation. The State Personnel Board is not now subject to the APA, and thus under the restructured statute will be able to use its own agency hearing procedure and not be subject to the time requirements of Section 649.110.

When the **Department of Social Services** receives a license application, it may deny the application. The applicant may appeal the denial, requiring the Department to commence an adjudicative proceeding. The Department says Section 642.240 might be read as requiring an adjudicative proceeding when a license application is denied, even though the applicant does not request a hearing. Exhibit pp. 136-137. This is partially addressed in the third sentence of the Comment, which might be improved as follows:

> The effect of this section, when combined with Section 631.030, is that <u>when a person makes an application for an agency decision (deemed by Section 642.220 to include an application for an appropriate adjudicative proceeding),</u> this part imposes no procedures on the agency when it decides not to conduct an adjudicative proceeding in response to an application for an agency decision, except to give a written notice of denial, with a brief statement of reasons and of any available administrative review.

The **California Public Employees' Retirement System** is also concerned about the 90-day requirement to approve or deny an application for an agency decision or commence an adjudicative proceeding. PERS says it can take many months to evaluate benefit applications, especially those for disability retirement where PERS must often obtain its own medical examination and report. Exhibit p. 205-206. PERS is now an APA agency, and so will not be able to use the agency hearing procedure. It appears PERS will need statutory language to give

it more than the 90 days provided in Section 642.240. The staff would add the following to Government Code Sections 20133 and 22776:

> Proceedings shall be conducted in accordance with Part 4 (commencing with Section 641.110) of Division 3.3 and the board shall have all of the powers granted therein, except that the board shall have 180 days to take the action required by subdivision (c) of Section 642.240.

The **California Energy Commission** approves Section 642.240. Exhibit p. 124.

§ 642.310. Proceeding commenced by agency pleading

The **State Water Resources Control Board** says a complaint-like initial pleading is taken from the occupational licensing model, and is inappropriate in multi-party proceedings to determine water rights where the Board acts as a kind of referee. Exhibit pp. 84-85. Other agencies have made a similar point in the past. Section 642.310 now provides for an "agency pleading" to commence an adjudicative proceeding, and other provisions of the draft have been recast in a less adversarial tone as part of the staff-proposed restructuring of the statute.

The **Pacific Gas and Electric Company** says it is unclear when "third round pleadings" are permitted, if at all. Exhibit p. 92. The draft statute provides for an agency pleading, a response, and amended and supplemental pleadings. Sections 642.310, 642.350, 642.360. Like existing law, there is no provision for a cross-complaint or an answer to a cross-complaint as in civil practice. The staff would not authorize additional pleadings beyond the agency pleading and response.

• PG&E asks when pleadings can be withdrawn. An agency may dismiss the proceeding before the hearing. California Administrative Hearing Practice, *supra*, § 2.116, at 149. A person may stipulate to a decision, or may settle the case. *Id.* § 2.106, at 137. We could codify agency authority to dismiss a proceeding as follows:

> **§ 642.370. Dismissal of proceeding**
>
> 642.370. At any time before the hearing, the agency may dismiss an adjudicative proceeding without prejudice.
>
> **Comment.** Section 642.370 codifies case law. See Kendall v. Board of Osteopathic Examiners, 105 Cal. App. 2d 239, 248, 233 P.2d 107, 113 (1951). Although the dismissal is without prejudice, if the agency later recommences the proceeding, the person against whom the action is taken may seek dismissal on the ground that the agency has failed to proceed diligently. Steen v. City of Los Angeles, 31 Cal. 2d 542, 547, 190 P.2d 937, 940 (1948).

§ 642.320. Contents of agency pleading

The **Department of Health Services** says this section requires an agency pleading to show facts that justify a decision and to state the statutes and regulations violated, but does not provide a linkage between the two. Exhibit p. 21. Section 642.320 continues portions of Government Code Sections 11503 and 11504 which require a statement of "the acts or omissions" with which the respondent is charged, specifying "the statutes and rules which the respondent is alleged to have violated." The staff thinks Section 642.320 is satisfactory.

§ 642.330. Service of agency pleading and other information

Section 642.330 requires service of an agency pleading to be by certified or registered mail or personal delivery, and controls over Section 613.220 which permits service by fax unless another statute governs. The **Pacific Gas and Electric Company** suggests the statute "require agencies that are prepared to accept electronic filings to do so even with initial [now agency] pleadings." Exhibit p. 91. This suggestion will not work for an agency pleading, because it is served by, not on, the agency. Faxed service on the agency is already permitted for the response. Sections 642.350, 613.220.

The **Department of Social Services** is concerned we have not continued the provision in Government Code Section 11505(c) that makes service by registered mail effective if a statute or rule requires respondent to file his or her address with the agency and to notify the agency of any change, and if a registered letter with the accusation and accompanying material is mailed, addressed to respondent at the latest address on file with the agency. Exhibit p. 135. This provision is continued in substance in Section 613.210(b), which says that for the purpose of mailed service to a party's last known address, "if a party is required by statute or regulation to maintain an address with the agency that is sending the order or other writing, the party's last known address is the address maintained with the agency."

§ 642.350. Responsive pleading

The **Pacific Gas and Electric Company** would include rules for dismissal of a complaint for failure to state a cause of action and for other summary dispositions. Exhibit p. 93. Section 642.350 continues the existing rule that the response may object to the agency pleading for failing to state an act, omission, or other ground on which the agency may proceed, and for uncertainty. This is

the equivalent of a demurrer. When a demurrer is filed, by case law the agency must rule on it before proceeding with the hearing. We would add this to the Comment:

> If the response objects to the agency pleading on the ground that it does not state an act or omission or other ground on which the agency may proceed, or that it is indefinite or uncertain, the agency must rule on the objection before going forward with the hearing. Dyment v. Board of Medical Examiners, 57 Cal. App. 260, 264, 207 P. 409, 411 (1922).

§ 642.360. Amended and supplemental pleadings

Section 642.360 permits a party to amend or supplement a pleading "at any time before the hearing." The **Occupational Safety and Health Appeals Board** believes its regulations are superior to Section 642.360 because they limit amended pleadings to correcting clerical errors in pleadings, to conform to proof or statutory requirement, and only when timely filed, no prejudice is shown, and all parties are given notice. Exhibit p. 9. The staff believes Section 642.360 is satisfactory. It requires service of the amended or supplemental pleading on all parties and, if a new issue is presented, provides the other party a reasonable opportunity to prepare a case. The staff would not limit Section 642.360 to permit amendments only to correct clerical errors or to conform to proof or statutory requirement.

§ 642.420. Continuances

• Section 642.420 does not continue the provision in Government Code Section 11524 for immediate judicial review of administrative denial of a request for a continuance. The **Department of Insurance** and **State Bar Committee on Administration of Justice** would continue the provision for immediate judicial review. Exhibit pp. 95, 152. They argue that denial of a continuance can severely prejudice a party's ability to present its case. The narrative in the Tentative Recommendation justifies the proposed new rule by saying denial of a continuance is no more prejudicial than any other adverse decision and, in the interest of judicial economy, should not require early and separate judicial review. This issue may be appealed along with other matters at the end of the administrative adjudication process. The staff thinks the proposed new rule is an improvement.

• The **State Personnel Board** says it has a special statute on continuances (Gov't Code § 19579) that allows a continuance not only for good cause, but also by mutual agreement of the parties. The Board wants to keep its special rule. Exhibit p. 111. We could generalize this rule by revising subdivision (a) of Section 642.420 as follows:

> 642.420. (a) The presiding officer may grant a continuance for good cause, or on the mutual agreement of the parties.

§ 642.430. Venue

• The venue rules in Section 642.430 are consistent with existing law under Government Code Section 11508. APA hearings are generally held in the major metropolitan area nearest to the place of the transaction or person's residence. The **State Water Resources Control Board** says proper venue should always include the agency's headquarters office. Exhibit p. 85. The Water Resources Control Board is a non-APA agency, and so will be able to use the agency hearing procedure and determine venue questions for itself, as will all other non-APA agencies. For APA agencies, the existing and proposed venue rules serve the convenience of the parties and perhaps of OAH ALJ's, but not the agency's prosecutorial staff. It might increase the likelihood that non-OAH agencies will use the proposed statute rather than an agency hearing procedure if we make venue proper in the county where the agency's headquarters office is located:

> 642.430. (a) The hearing shall be held in the following location:
>
> . . . .
>
> (5) In the county where the agency's headquarters office is located.

The **State Personnel Board** says the venue provisions are not practical for its hearings, often held at prisons or in other remote areas. Exhibit p. 111. First, existing and proposed venue provisions permit the agency to select a different place nearer to the place where the transaction occurred or the person resides than the prescribed metropolitan area. In effect, this permits an agency with statewide jurisdiction to hold a hearing anywhere in the state. California Administrative Hearing Practice, *supra*, § 2.53. Second, the APA does not generally apply to the State Personnel Board. We should ensure the Board may use the agency hearing procedure by adding the following to its statute:

> An adjudicative proceeding of the board is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

The **State Bar Committee on Administration of Justice** would expand venue by adding to existing permissible sites (San Francisco, Los Angeles, Sacramento, and San Diego) all the places where the Court of Appeal may sit (Santa Barbara, San Bernardino, Orange County, Fresno, and San Jose), and perhaps also Riverside, Redding, and San Luis Obispo. Exhibit p. 150. Now the Office of Administrative Hearings has ALJ's only in Sacramento, Los Angeles, and San Francisco. California Administrative Hearing Practice, *supra*. To create new OAH offices would entail an expense that would probably be unacceptable to the Legislature.

• The **California Public Employees' Retirement System** suggests the statute either specify a time before the hearing after which a motion for change of venue will not be entertained, or provide that venue will not be changed if it would cause unnecessary delay. Exhibit p. 206. In civil actions, a motion for change of venue must be made at the pleading stage. Code Civ. Proc. § 396b. Failure to do so waives the right. 3 B. Witkin, California Procedure *Actions* § 677, at 694 (3d ed. 1985). The staff thinks this a good suggestion. We would add the following to the last paragraph of the Comment to Section 642.430:

> In exercising discretion under subdivision (c) whether to grant a motion for change of venue, the presiding officer may consider the timeliness of the motion and whether granting it would cause unnecessary delay.

• Or we could codify this rule by revising subdivision (c) of Section 642.430 as follows:

> (c) The person to which the agency action is directed may move for, and the presiding officer in its discretion may grant or deny, a change in the place of the hearing. <u>The presiding officer shall not grant a motion for a change in the place of the hearing made more than 60 days after service of the agency pleading, or less than 15 days before the hearing, whichever is earlier, if granting the motion will cause unnecessary delay.</u>

§ 642.440. Notice of hearing

• Section 642.440 requires service of notice of hearing at least 15 days before the hearing. The **Department of Social Services** thinks 15 days is too long for it in view of its short time frames for hearing. Exhibit p. 137. Existing law requires service at least 10 days before the hearing. Gov't Code § 11509. We should either draft a special statute for DSS to provide a shorter time before the hearing for its service, or change the general rule in the draft statute back to the 10-day requirement of existing law. We could do the latter with the following revision:

> 642.440. (a) The agency shall serve a notice of hearing on all parties at least ~~15~~ 10 days before the hearing.

§ 643.110. Designation of presiding officer

The **State Water Resources Control Board** supports Section 643.110. Exhibit p. 85.

§ 643.110. OAH administrative law judge as presiding officer [formerly § 643.120]

Section 643.110 requires agencies not exempted by statute to use OAH ALJ's. The **State Water Resources Control Board** is not now subject to the APA, and wants to make sure it can continue to use its own hearing officers. Exhibit p. 85. The staff would do this by adding the following sections to the Water Code:

> **Water Code § 1350.5 (added). Conduct of adjudicative proceeding**
> 1350.5. An adjudicative proceeding of the board is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.
>
> **Water Code § 13221.5 (added). Conduct of adjudicative proceeding**
> 13221.5. An adjudicative proceeding of a regional board is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

• Two private attorneys, **Richard Hutton** and **Ed Kuwatch**, are concerned about "fundamental unfairness" in Department of Motor Vehicle pre-conviction license suspension hearings under Vehicle Code Section 13353.2 for driving under the influence of alcohol. Exhibit pp. 213-17, 220-26. The hearing officer is a non-lawyer from DMV's Driver Safety Division. The hearing officer presents DMV's case and makes the ultimate ruling. Mr. Hutton and Mr. Kuwatch would

require these hearings to be conducted by an ALJ from OAH. Mr. Hutton proposes the alternative of establishing a separate office within DMV for its hearing officers, separate from the prosecutorial function, to hear these cases. He would finance this by increasing the fee for license reinstatements. The Tentative Recommendation exempts DMV from the separation of function provision in Section 643.320 because of its personnel problems due to the large volume of drivers' licensing cases. Does the Commission wish to reconsider this decision?

The **State Personnel Board** supports the decision not to require a general removal of agency hearing personnel and functions to a central panel. Exhibit p. 110.

• The **State Bar Committee on Administration of Justice** disagrees with the decision not to require a general removal of agency hearing personnel and functions to a central panel. Exhibit pp. 145-147. CAJ says "there is an appearance of unfairness," particularly to the average citizen who is the responding party. Where the agency acts as "accuser, judge, jury and executioner," public faith in the process may be eroded. CAJ believes that exemptions from the central panel process should be granted sparingly, and only if the agency regulates a specialized and sophisticated constituency or the subject matter is so new or complex that use of an agency hearing officer is the only realistic way to achieve justice. Where a requested exemption is purportedly based on the need for technical expertise, it should be granted only if there is a consensus among parties and attorneys regularly participating in these adjudications that central panel hearing officers cannot develop sufficient expertise on a case-by-case basis. The **California School Employees Association** also believes there should be a central panel of hearing officers for most formal hearings. Exhibit p. 79. Does the Commission wish to reconsider this decision?

The **Pacific Gas and Electric Company** suggests statutory guidance to ALJ's in ruling on "requests to limit, alter, or refocus on-going proceedings." Exhibit p. 93. Under Section 643.110 as under existing law, the ALJ exercises "all powers relating to the conduct of the hearing." We would add the following to the Comment to Section 643.110:

> Under Section 643.110, the presiding officer exercises "all powers relating to the conduct of the hearing." This gives the presiding officer broad discretion over the conduct of the hearing, including regulating the order of proof and personally questioning witnesses. See California Administrative Hearing Practice §§ 3.20,

3.48, at 168, 193 (Cal. Cont. Ed. Bar 1984). See also Section 6648.420 (discretion of presiding officer to exclude evidence).

§ 643.130. Substitution of presiding officer

The **State Bar Committee on Administration of Justice** supports Section 643.130. Exhibit p. 149.

§ 643.210. Grounds for disqualification of presiding officer

The **State Personnel Board** is concerned about the provision disqualifying a presiding officer for bias because of the "small number of ALJs." Exhibit p. 111. But this provision is similar to existing law which disqualifies an ALJ who "cannot accord a fair and impartial hearing." Gov't Code § 11512. Last session the Legislature required the Public Utilities Commission to adopt procedures for disqualification of ALJ's for bias or prejudice similar to those of other state agencies and superior courts, and to report to the Legislature. Pub. Util. Code § 309.6 (1993 Cal. Stat. ch. 822). The staff would not change this provision.

The **Department of Social Services** thinks an earlier proposal to send to the parties the names of all ALJ's on the panel for the district, with each party (excluding intervenors) having one peremptory challenge, is worth further exploration. Exhibit pp. 137-138.

The **State Bar Litigation Section** approves Section 643.210. Exhibit p. 170.

§ 643.230. Procedure for disqualification of presiding officer

Section 643.230 says that, unless the agency provides by regulation for earlier administrative review, determination of a disqualification request is reviewable with all other determinations after the proceeding is concluded. Existing law precludes judicial review of intermediate administrative decisions except to avoid irreparable injury. California Administrative Hearing Practice, *supra*, § 4.68; California Administrative Mandamus § 2.48 (Cal. Cont. Ed. Bar 2d ed. 1989). It is unclear whether the irreparable injury exception applies to an adverse decision on a bias claim, thus making it immediately reviewable.

The **Department of Insurance** and **State Bar Litigation Section** say review of a disqualification request should occur before the hearing. Exhibit pp. 95, 170-71. The State Bar Section says that if the refusal to disqualify is ultimately reversed, the matter will have to be reheard, a waste of resources. But the State Bar Section thinks it will be hard to get a reversal on review, because it will be impossible to show another ALJ would have decided the matter differently. Section 643.230 is

consistent with the Commission's decision to delay review of denial of a request for a continuance until after the proceeding is concluded, because it is "no more prejudicial" than any other adverse decision, and precluding separate and early review is in the "interest of judicial economy." It would be at least as great a waste of resources to provide immediate review, halting the proceeding until review is completed. The staff would not change this provision.

§§ 643.320-643.340. Separation of functions generally

The separation of functions provisions apply both to the presiding officer at the hearing (Section 643.320) and on administrative review (Section 649.230). The **State Water Resources Control Board** is concerned this will prevent staff who do the initial review and make a recommendation at the hearing from making a recommendation to the agency head on administrative review, thus imposing a costly requirement of a second set of staff to perform this function. Exhibit p. 86. Although these sections apply to a "presiding officer" (the person who conducts the hearing), Section 649.230(d) applies the separation of functions provisions to administrative review. According to Professor Asimow,

> [T]he involvement of staff adversaries in advising decision-makers is a legitimate cause for concern. While APAs meticulously structure the initial hearing process, they say very little about the process whereby the agency heads render a final decision. The agency heads can use whatever process they wish, including heavy reliance on advisers. Thus, it is important that such advisers be persons who lack a personal commitment to find for a particular party.

Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1167 (1992). However, the staff would add the following to the Comment to Section 649.230:

> Nothing in the separation of functions provisions prevents an investigator, prosecutor, or advocate at the hearing from serving in that capacity on administrative review.

• Should we go further and permit an agency investigator in the pre-adjudicative stage later to serve as an adviser to the presiding officer at the hearing or on administrative review? The staff is inclined not to do this.

• The **State Water Resources Control Board** would like authority to relax the separation of functions provisions by regulation. Exhibit p. 86. The staff would

not do this. Separation of functions is one of the key due process requirements in Section 633.030, and should not be subject to relaxation by regulation.

§ 643.320. When separation required

• There is an exemption in subdivision (b) of Section 643.320 from the separation of functions requirement for DMV drivers' license hearings. The Comment says this "recognizes the personnel problem faced by the Department of Motor Vehicles due to the large volume of drivers' licensing cases." The Comment notes the exemption does not apply to other DMV hearings, such as schoolbus operation certificate hearings. Attorneys **Dale Wood**, **Richard Hutton**, **Ed Kuwatch**, and **Henry Rupp**, the **California School Employees Association**, and the **State Bar Litigation Section** object to this exemption. Exhibit pp. 79, 172, 209-210, 216, 224, 228-29. Mr. Wood vehemently opposes this exemption, saying the DMV "is, without a doubt, the most abusive administrative agency in California." Exhibit p. 209-210. Mr. Hutton, Mr. Kuwatch, and Mr. Rupp oppose the exemption particularly for pre-conviction license suspension hearings under Vehicle Code Section 13353.2 for driving under the influence of alcohol ("administrative per se hearings"). They believe the present system of having the DMV hearing officer present the department's case and then rule on the driver's objections and decide the case is fundamentally unfair. Exhibit pp. 216, 224, 228-29.

The **Department of Motor Vehicles** says the separation of functions exemption does not go far enough, because it is limited to drivers' licensing under Division 6 of the Vehicle Code. DMV wants the exemption expanded to include hearings on school bus certificates, ambulance driver certificates, special licensing endorsement or classification hearings, and suspensions for failure to show financial responsibility. Exhibit pp. 211-12. License endorsements or classifications are included in Division 6 of the Vehicle Code (e.g., Veh. Code § 12804), and so will be exempt. We can add a statement to that effect to the Comment.

• To operate a schoolbus or ambulance, both a drivers' license and a schoolbus or ambulance certificate are required. Veh. Code §§ 12517 (schoolbus), 12527 (ambulance). Revocation hearings for schoolbus and ambulance certificates are provided by Sections 13371 (final decision on schoolbus certificate made by Certificate Action Review Board) and 13374 (informal hearing on ambulance certificate) of the Vehicle Code. These are all in Division 6 of the

Vehicle Code, but the exemption provided in Section 643.320 applies to "license" hearings but not "certificate" hearings. At previous Commission meetings, the **California School Employees Association** urged us not to exempt school bus certificates from the separation of functions requirement, arguing that the certificate is an essential for employment of school bus drivers. The number of these certificates seems likely to be small compared to the number of drivers' licenses, so the staff is inclined not to exempt certificates from the separation of functions requirement.

• Is it good policy to exempt driver's license hearings from the separation of functions requirement? As noted above, there is a perception of unfairness in permitting DMV personnel to act both as prosecutor and as judge. If the exemption in subdivision (b) for drivers' license hearings were deleted, it would impose substantial new costs on DMV, which may doom the proposal in view of the state's continuing fiscal crisis. Does the Commission wish to reconsider the exemption in subdivision (b) for drivers' license hearings?

• DMV also refers to seizure and sale hearings for delinquent registration fees under Vehicle Code Section 9801, not now covered by the separation of functions exemption in subdivision (b). Although DMV does not ask for an exemption for these hearings, perhaps one should be provided. A reasonable compromise might be to exempt seizure and sale hearings, but not to exempt administrative per se hearings for driving under the influence of alcohol which is where the perception of abuse is strongest.

The Comment to Section 643.320 says that, while the section precludes an adversary from assisting or advising a presiding officer, the presiding officer is not precluded from assisting or advising an adversary. The **California Energy Commission** is concerned about the possibility of a presiding officer assisting or advising some parties but not others in multi-party cases, and would like cautionary language added to the Comment. Exhibit p. 124. The staff agrees, and would add the following to the Comment:

> However, in multi-party cases, a presiding officer should give assistance or advice with caution, since there may be an appearance of unfairness if assistance or advice is given to some parties but not others.

The **State Bar Litigation Section** approves subdivision (a)(2) prohibiting a person subject to the authority of a person who has served as investigator,

prosecutor, or advocate to serve as presiding officer in the same proceeding. Exhibit p. 172.

§ 643.330. When separation not required

• Section 643.330 has exceptions to the separation of functions requirement. The **State Bar Committee on Administration of Justice** and **State Bar Litigation Section** would delete subdivision (a)(1) permitting a "person who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding" to "serve as presiding officer or assist or advise the presiding officer in the same proceeding." Both Bar Sections say this creates the appearance and likelihood of bias. Exhibit pp. 149, 171. This provision is found in the 1981 Model State APA, and actual bias remains a ground for disqualification of the presiding officer. It is not a ground to disqualify a judge in a civil proceeding that the judge has "in any capacity expressed a view on a legal or factual issue presented in the proceeding," except that the trial judge may not participate in appellate review of that proceeding, and the appellate court may direct that further proceedings be had before a trial judge other than the one whose judgment was reviewed. Code Civ. Proc. §§ 170.1-170.2. Thus, for example, there appears to be no general prohibition against a judge who issues a temporary restraining order from later hearing the case on the merits, although a judge who expresses an opinion on the merits before having heard all the evidence may be subject to disqualification for bias. See 2 B. Witkin, California Procedure *Courts* § 93, at 110 (3d ed. 1985). The staff would keep subdivision (a)(1) permitting an ALJ who makes a preliminary determination to hear the case on the merits.

• An exception in Section 643.330(a)(4) permits a person who has served as investigator or advocate in an adjudicative proceeding to supervise, assist, or advise the presiding officer later in the same proceeding if it is "nonprosecutorial," the service, assistance, or advice occurred more than one year after the person served as investigator or advocate, the advice is disclosed on the record, and all parties have an opportunity to comment. The **State Bar Committee on Administration of Justice** thinks this provision creates a likelihood of bias and should be deleted. Exhibit pp. 149-50. The **Department of Health Services** is concerned that "nonprosecutorial" is unclear, and should be defined. Exhibit p. 22. DHS asks whether a proceeding to grant a license over objection from public advocates is nonprosecutorial. And, "What about a

proceeding to determine whether a nonpunitive transfer of a state employee was lawful?" The Comment gives individualized ratemaking and power plant siting decisions as examples of what is nonprosecutorial. The Comment says this exception "recognizes that the length and complexity of many cases of this type may as a practical matter make it impossible for an agency to adhere to the separation of functions requirements, given limited staffing and personnel." Section 643.330 was drawn from the 1981 Model State APA, but the exception in subdivision (a)(4) was our own innovation. It appears this provision was included for the Public Utilities Commission and California Energy Commission. We tentatively decided to exempt the Public Utilities Commission from the new APA, but not the Energy Commission. The staff would delete subdivision (a)(4) from the draft statute, and include a similar provision in the Energy Commission's statute, applicable to that agency only:

Gov't Code § 643.330. When separation not required

643.330. (a) Unless a party demonstrates other statutory grounds for disqualification:

(1) A person who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise the presiding officer in the same proceeding.

(2) A person may serve as presiding officer at successive stages of the same adjudicative proceeding.

(3) A person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding may advise the presiding officer concerning a settlement proposal advocated by the person in the same proceeding.

~~(4) A person who has served as investigator or advocate in an adjudicative proceeding may serve as a supervisor of the presiding officer or assist or advise the presiding officer in the same proceeding if the proceeding is nonprosecutorial in character and the service, assistance, or advice occurs more than one year after the time the person served as investigator or advocate, provided the content of any advice is disclosed on the record and all parties have an opportunity to comment on the advice.~~

~~(5)~~ (4) A person who has served as investigator or advocate in an adjudicative proceeding may give advice to the presiding officer concerning a technical issue involved in the same proceeding if the proceeding is nonprosecutorial in character and the advice concerning the technical issue is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties have an opportunity to comment on the advice.

(b) Nothing in this section authorizes a communication between the presiding officer and another person to the extent the communication is otherwise prohibited by Section 648.520.

Pub. Res. Code § 25513.3 (added). When separation of functions not required

25513.3. Notwithstanding Article 3 (commencing with Section 643.310) of Chapter 3 of Part 4 of Division 3.3 of the Government Code, unless a party demonstrates other statutory grounds for disqualification, a person who has served as investigator or advocate in an adjudicative proceeding of the commission under this code may serve as a supervisor of the presiding officer or assist or advise the presiding officer in the same proceeding if the service, assistance, or advice occurs more than one year after the time the person served as investigator or advocate, provided the content of any advice is disclosed on the record and all parties have an opportunity to comment on the advice.

• The **Department of Health Services** is also concerned about the provision in Section 643.330(a)(5) that permits a person who has served as investigator or advocate in an adjudicative proceeding to give advice to the presiding officer on a technical issue if the proceeding is nonprosecutorial and the advice is disclosed on the record and all parties have an opportunity to comment. DHS asks what it means to disclose the "content" of the advice, and urges more procedural detail. The staff would do this by applying the provision for disclosure of and comment on an ex parte communication:

~~(5)~~ (4) A person who has served as investigator or advocate in an adjudicative proceeding may give advice to the presiding officer concerning a technical issue involved in the same proceeding if the proceeding is nonprosecutorial in character and the advice concerning the technical issue is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record , and all parties have an opportunity to comment on the advice, in the same manner as provided in Section 648.540 for an ex parte communication.

The **State Bar Committee on Administration of Justice** and **State Bar Litigation Section** say the technical advice provision set out immediately above should include a requirement that, before receiving the advice, the presiding officer should require notice to non-agency parties and an opportunity to be present when the advice is given. Exhibit pp. 150, 171-72. The staff thinks this is

adequately addressed by the requirement that the content of the advice be "disclosed on the record and all parties have an opportunity to comment."

• The **State Water Resources Control Board** is concerned about applying the separations of functions provisions where the staff acts more as impartial adjudicator than prosecutor, for example, where the contest is between parties outside the agency. Exhibit p. 86. There appears to be no problem in applying the prohibition to a person who has acted as "prosecutor" or "advocate." But an "investigator" may possibly act impartially. We could add a provision to Section 643.330 as follows:

> A person who has served as an impartial investigator in a proceeding where the contest is between parties outside the agency and the person has not advocated a particular position or result may assist or advise the presiding officer in the same proceeding.

• The **State Water Resources Control Board** would not apply the separation of functions provisions to informal hearings. Exhibit p. 86. The staff opposes this. The informal hearing procedure has no prehearing conference or discovery. But informality does not diminish the need for the fairness of an impartial decisionmaker. There are already exceptions to the separation of functions requirement for large, complex cases — for nonprosecutorial cases where the conflicting function occurred more than one year before the decision is being made, or where the advice is on a technical issue. There is also an exception for DMV licensing cases, discussed under Section 643.320 above. The staff would not add more exceptions.

§ 643.340. Staff assistance for presiding officer

Section 643.340 permits a presiding officer to receive assistance from a staff assistant if the assistant does not receive an ex parte communication or furnish, augment, diminish, or modify the evidence in the record. The provisions on ex parte communication prohibit communication without notice and opportunity to be heard for all parties. The **State Water Resources Control Board** says this is too restrictive. The Board says it expedites proceedings if parties can discuss their contentions with agency staff. Exhibit. p. 87. The Board concedes this should not permit staff to "become a conduit" for ex parte communication with the agency. The statute does not prohibit parties from discussing their case with staff. It only prohibits that staff person from then providing assistance to the presiding officer. And the ex parte communication provisions (Section 648.520)

expressly authorize a communication between agency staff and the presiding officer "for the purpose of assistance and advice to the presiding officer," provided the assistance or advice does not violate the separation of functions provision. These provisions seem satisfactory. The staff will review Sections 643.340 and 648.520 to ensure they are consistent with each other.

§ 644.120. Conditions on intervention

The California Energy Commission approves Section 644.120, which permits the presiding officer to impose conditions on an intervenor's participation. Exhibit p. 125.

§ 644.140. Intervention determination nonreviewable

The **California Energy Commission** and **State Bar Committee on Administration of Justice** are concerned about the provision that intervention determinations are not subject to administrative or judicial review. Exhibit p. 125, 151. CEC would permit agencies by regulation to provide at least for administrative review. Exhibit p. 125. CAJ would say denial of intervention is immediately reviewable as of right, and a grant of intervention is subject to discretionary review. Exhibit p. 151. These points are addressed by the staff recommendation under the next section (Section 644.150) to permit agencies to modify or opt out of the intervention provisions.

§ 644.150. Participation short of intervention

• Section 644.150 permits agency regulations to authorize participation by a person short of intervention. The Comment says regulations "may provide, for example, for filing of amicus briefs, testifying as a witness, or contributing to the fees of a party." The **State Water Resources Control Board, Department of Social Services,** and **Public Utilities Commission** want broader authority to adopt regulations to modify or make inapplicable the intervention provisions. Exhibit pp. 54-55, 87, 138. The Water Board says the intervention provisions are more restrictive than its current procedures. DSS says welfare hearings are confidential so intervention is inappropriate, and there are costs and delays associated with intervention. The PUC is concerned the intervention provisions are more restrictive than PUC regulations, which permit a person or entity to show up at a hearing and intervene after making a few simple disclosures. Although we tentatively exempted the PUC from the new APA, this reinforces the same point made by the Water Board and DSS. The **California Energy**

Commission thinks the requirement in Section 644.110 that the motion to intervene be made before the prehearing conference is too strict. CEC says persons affected by alternate power plant siting proposals may not learn of the project until after the first prehearing conference, and that it would be an unfair denial of due process not to allow intervention at that point. Exhibit p. 124-125. CEC would permit an agency by regulation to allow intervention after the prehearing conference if the applicant shows he or she could not have known before the prehearing conference that his or her rights would be affected.

• The staff thinks a case has been made to permit all agencies to modify the intervention provisions by regulation. We could do this by adding the following to Section 644.150, comparable to provisions in Sections 635.060 (declaratory decision), 647.210 (alternative dispute resolution), and 648.310 (burden of proof):

> By regulation an agency may modify the provisions of this chapter or make the provisions of this chapter inapplicable.

§ 645.110. Application of chapter

The **Pacific Gas and Electric Company** generally likes the discovery provisions, but is unenthusiastic about the authority for agencies by regulation to modify them or make them inapplicable. Exhibit p. 91. The authority for modification by regulation is deleted in the restructured statute.

The **Public Employment Relations Board** is concerned about the draft statute's "liberal discovery in comparison to that presently permitted before PERB," stressing the need to protect witnesses in unfair labor cases. Exhibit pp. 196-97. PERB is exempt from the APA under existing law. The Commission tentatively decided to exempt from the new APA PERB hearings on certification elections, but not on unfair labor practices. However, with respect to unfair labor practice hearings, we will continue PERB's authority to use non-OAH ALJ's. Thus PERB will be able to use the agency hearing procedure and craft its own discovery provisions.

§ 645.130. Depositions

Depositions in administrative proceedings are not for discovery. They are to obtain testimony for use at the adjudicative hearing if the witness "will be unable or can not be compelled to attend" the hearing. Section 645.130 generally continues existing law.

The **Pacific Gas and Electric Company** likes Section 645.130. Exhibit p. 92.

The **Department of Social Services** thinks the requirement of a petition and court order to depose an out-of-state witness is unnecessary and wasteful if the witness is willing to testify voluntarily at the deposition. The Department would not require court involvement for a subpoena to an out-of-state witness to attend a deposition, but an objecting party could make a motion to quash. Exhibit p. 138. A court order is necessary because many states enforce a commission to take a deposition only if it issues from a court of another state. 1 G. Ogden, California Public Agency Practice § 37.06[11][c] (rev. 1993).

DSS also would revise the provision that the agency must obtain the court order to say the party seeking the deposition must obtain the order. But since subdivision (d) of this section requires an administrative order by the agency to precede an application for a court order, it seems logical to require the agency to seek enforcement of its own order.

§ 645.210. Time and manner of discovery

• The **Department of Health Services** points out a problem in applying to an emergency decision the requirement in Section 645.210 that discovery is available for 30 days after service of the agency pleading. Exhibit pp. 22-23. This seems to be a good point. Under the emergency decision provisions, notice and hearing is required only if "practicable." The agency record consists of any documents considered or prepared by the agency. After an emergency decision, the agency must commence an adjudicative proceeding within 10 days, whether or not review of the emergency decision is pending. The emergency decision is reviewable within 15 days after a petition for review. The reviewing authority relies on the record of the emergency proceedings, and may take additional evidence only if in the exercise of reasonable diligence the evidence could not have been produced at the hearing. Thus discovery would be useful if the reviewing authority intends to take additional evidence. The staff would add "Subject to subdivision (b)" at the beginning of subdivision (a) of Section 645.210, and would add a new subdivision (b) (redesignating existing subdivision (b) as subdivision (c)) as follows:

> (b) If a person seeks administrative or judicial review of an emergency decision, a party, on written request of another party, before the proceedings for review and within 10 days after issuance of the emergency decision, is entitled to discovery to the extent provided in this article.

• DHS has a problem with existing subdivision (b), imposing a continuing duty on a party to disclose supplemental matter within the scope of a discovery request. DHS says continuing discovery is "uniformly disfavored." Exhibit p. 22. The draft statute continues the limited discovery approach of existing law. The Tentative Recommendation says the "Commission believes the extensive discovery available in civil proceedings is inappropriate for administrative adjudications." Thus, for example, there is no provision for interrogatories under the APA or under the draft statute. The draft statute provides only for discovery of witness lists, statements, writings, and reports. The 1981 Model State APA provides for discovery "in accordance with the rules of civil procedure." Under California and federal civil practice, continuing interrogatories are prohibited. Code Civ. Proc. § 2030(c)(7); 2 B. Witkin, California Evidence *Discovery and Production of Evidence* § 1486, at 1452 (3d ed. 1986). But a different rule applies to discovery of witness lists: A party who has exchanged an expert witness list may move to add a later-retained expert, and the court may permit it if it will not prejudice the opposing party. Code Civ. Proc. § 2034(k). The staff would follow this approach in limiting continuing discovery:

> (b) ~~Notwithstanding~~ Subject to subdivision (c) of Section 645.230, notwithstanding a party's compliance with a request for discovery under this article, the party has a continuing duty to disclose and make available to the requesting party ~~any~~ the following supplemental matter within the scope of the request for discovery immediately on obtaining knowledge, possession, custody, or control of the matter ~~:~~ :
>
> (1) The names and addresses of witnesses the party intends to call to testify at the hearing.
>
> (2) A statement of a witness then proposed to be called by the party, including a party or the complainant, having personal knowledge of the acts, omissions, or events that are the basis for the proceeding.
>
> (3) All writings, including but not limited to, reports of mental, physical, and blood examinations, and things that the party then proposes to offer in evidence.

The **Pacific Gas and Electric Company** approves Section 645.210. Exhibit p. 92.

§ 645.230. Discovery of statements, writings, reports

Section 645.230(b)(3) permits discovery of "any writing or thing that is relevant." Existing law permits discovery of "any writing or thing that is relevant and which would be admissible in evidence." Gov't Code § 11507.6(e). The **Department of Social Services** suggests the Comment explain the omission in subdivision (b)(3) of the admissibility requirement of existing law. Exhibit p. 139. This may not be a significant substantive change, because in administrative proceedings all relevant evidence is admissible, subject to the discretion of the presiding officer to exclude unduly repetitious evidence. Sections 648.410-648.420. Nonetheless, the staff would accept DSS' suggestion by adding the following to the third paragraph of the Comment:

> Subdivision (b)(3) does not continue the provision in former Section 11507.6 that, to be discoverable, the writing or thing must be admissible in evidence. This more nearly approximates the rule of civil practice that discoverable matter must be relevant, but need not be admissible in evidence. See Code Civ. Proc. § 2017(a).

• Should we restore to subdivision (b) the limitation of Code of Civil Procedure Section 2017(a) that discoverable matter must either be "itself admissible in evidence" or "reasonably calculated to lead to the discovery of admissible evidence"? This would be consistent with the 1981 Model State APA, which says discovery shall be "in accordance with the rules of civil procedure." On the other hand, perhaps the relevancy requirement is enough, because it seems likely that any relevant matter may lead to discovery of admissible evidence.

§ 645.310. Time for response to discovery request

Section 645.310 allows 20 days to respond to a discovery request. If a party fails to respond in that time, a motion to compel under Section 645.320 must be made within 15 days after expiration of the 20-day period. The **California Public Employees' Retirement System** is concerned a party subject to discovery may still be trying to comply at the end of the 20-day period and need more time. PERS would either (1) say in the statute that the time may be extended by stipulation, or (2) would extend the time for discovery to a specified time before the hearing. Exhibit p. 206-207. The staff prefers the first of these, and would add the following to Section 645.310:

645.310. A party shall respond to a request for discovery within 20 days after service of the request , or within such other time as may be provided by stipulation.

The Comment would note that, although other time periods may be varied by stipulation, an express provision is included here because under Section 645.320 the time within which a motion must be made to compel discovery commences to run from expiration of the time provided in this section.

The **Pacific Gas and Electric Company** approves Section 645.310. Exhibit p. 92.

§ 645.320. Motion to compel discovery

The **California Public Employees' Retirement System** strongly approves Section 645.320, which gives the presiding officer power to compel discovery, rather than the superior court. Exhibit p. 207.

§ 645.350. Order compelling discovery

The **Department of Health Services** is concerned this article says nothing about review of discovery orders. Exhibit p. 23. Under existing law, discovery orders are made by the superior court and are not appealable, but are reviewable by petition to the court of appeal for a writ of mandamus. Gov't Code § 11507.7(h). The draft statute makes refusal to obey a lawful agency order punishable for contempt by the superior court, which is not appealable. The draft statute also permits imposition of monetary sanctions for delaying tactics, subject to administrative and judicial review in the same manner as the ultimate decision in the proceeding. The staff would clarify this by putting the following in the Comment:

> An order of the presiding officer compelling discovery is enforceable by certification to the superior court of facts to justify the contempt sanction. Sections 648.610-648.620. A court judgment of contempt is not appealable. Code Civ. Proc. §§ 1222, 904.1(a). The presiding officer may also impose monetary sanctions for bad faith tactics, which is reviewable in the same manner as the decision in the proceeding. Section 648.630.

§ 645.410. Subpoena authority

The **Department of Insurance** opposes the provision permitting a subpoena duces tecum to require production of documents "at any reasonable time and

place," not merely at the hearing. The Department says this will turn the administrative process into a "into a more costly civil paper war." Exhibit p. 95. A subpoena duces tecum is used for documents of a non-party. For a party, inspection may be had on request and enforced by motion. Sections 645.310, 645.320. The draft statute is similar to civil procedure under which a subpoena duces tecum may require production of documents "at a particular time and place." Code Civ. Proc. § 1985. The new provision permitting production of documents before the hearing seems like a useful tool in preparing for the hearing, if its benefit is not offset by adding new costs to the proceeding. There is some protection in Section 645.420, which requires a subpoena duces tecum to be issued in accordance with Sections 1985 to 1985.4 of the Code of Civil Procedure. Section 1985 of the Code of Civil Procedure requires an affidavit showing good cause for a subpoena duces tecum. The staff is inclined to keep the provision for production of documents "at any reasonable time and place," but would add a reference to the good cause requirement in the Comment to Section 645.420 as discussed under that section immediately below.

The **Department of Social Services** wants immediate judicial review of a refusal to quash a subpoena duces tecum. The subpoena may seek protected information where the damage cannot be undone later. Exhibit p. 139. Immediate judicial review is available under the draft statute: The subpoena is enforced by the presiding officer certifying facts to the superior court for contempt proceedings, and the person charged "may purge the contempt in the same way" as for contempt of court. Proposed Section 648.620. If the court rules the subpoena is proper, it may allow an opportunity to comply with the subpoena to purge the contempt. We could clarify this by adding the following to the Comment to Section 648.620 (contempt):

> Under subdivision (b), the person charged may purge the contempt in the same way as for enforcement of court orders. As with support orders, it is long established practice of the courts to afford an opportunity to purge the contempt. See Ballantine v. Superior Court, 26 Cal. 2d 254, 257, 158 P.2d 14 (1945); Warner v. Superior Court, 126 Cal. App. 2d 821, 827, 273 P.2d 89 (1954).

§ 645.420. Issuance of subpoena

The **Pacific Gas and Electric Company** would require an affidavit showing good cause for issuance of a subpoena. Exhibit p. 92. This is already required by the provision that a subpoena duces tecum must be issued in accordance with

Sections 1985 to 1985.4 of the Code of Civil Procedure. Section 1985 of the Code of Civil Procedure requires an affidavit showing good cause for a subpoena duces tecum. The staff would make this clear by adding the following to the Comment:

> Subdivision (a) requires a subpoena or subpoena duces tecum to be issued in accordance with Sections 1985-1985.4 of the Code of Civil Procedure. For a subpoena duces tecum, this includes the requirement of an affidavit showing good cause for production of the matters and things described in the subpoena. Code Civ. Proc. § 1985.

§ 645.440. Witness fees

Section 645.440 continues existing law that a subpoenaed witness receives the same fees as a witness in a civil case, but this does not apply to an officer or employee of the state or a political subdivision of the state. The Comment cites the civil witness provisions in Government Code Sections 68093 to 68098. Government Code Section 68097.2 requires tendering $150 per day to a subpoenaed public employee, subject to later adjustment for actual expenses, including prorated salary. The **Department of Health Services** says some agencies apply this provision in administrative hearings and others do not. Exhibit p. 23. DHS suggests the actual cost provision be limited to upper level management, where a subpoena may be used as a harassment device. DHS would create a limited exception to the actual cost provision for necessary exculpatory witnesses in personnel hearings. But the staff thinks existing law is clear that the actual cost provisions do not apply to "officers or employees of the state or any political subdivision thereof." Gov't Code § 11510(c). The staff would not change existing law to require tendering actual costs of a subpoenaed public employee. If a subpoena is used for harassment, monetary sanctions may be imposed under Section 648.630 for frivolous bad faith tactics.

§ 646.120. Prehearing conference

The **State Water Resources Control Board** wants this section modified to codify its practice of using agency employees other than the presiding officer to conduct prehearing conferences. Exhibit p. 87. The staff agrees, and would modify subdivision (a) as follows:

(a) On motion of a party or by order of the presiding officer, the presiding officer or a different presiding officer designated by the agency head may conduct a prehearing conference.

Subdivision (d) of Section 646.120 permits the proceeding to be converted at the prehearing conference into an informal hearing. The **State Bar Committee on Administration of Justice** says a prehearing conference should "not be converted into an adjudicatory hearing and ADR should be considered where possible." Exhibit p. 150. The provision for conversion is drawn from the 1981 Model State APA, and seems like a desirable procedural shortcut. The draft statute does provide for alternative dispute resolution with consent of all parties and in the absence of a contrary regulation. Sections 647.210-647.220. Perhaps we should add a provision to Section 646.120(d) to make clear that proceeding may be converted at the prehearing conference into alternative dispute resolution:

(d) At the prehearing conference the proceeding may be converted into ~~an~~ either of the following:

(1) An informal hearing for disposition of the matter as provided in this part. The notice of the informal hearing shall state the date of the hearing.

(2) A proceeding for mediation or binding or nonbinding arbitration as provided in Chapter 7 (commencing with Section 647.210).

The **Pacific Gas and Electric Company** likes the new authority for telephone prehearing conferences. Exhibit p. 92.

§ 646.130. Subject of prehearing conference

The **Pacific Gas and Electric Company** likes the list in Section 646.130 of matters to be covered at a prehearing conference. Exhibit p. 92.

Subdivision (i) of Section 646.130 permits a prehearing conference to deal with "[e]xchange of witness lists and of exhibits or documents to be offered in evidence at the hearing." The Comment says a party who has not engaged in discovery "should not be permitted to use the prehearing conference as a substitute" for discovery. "The prehearing conference is limited to an exchange of information concerning evidence to be offered at the hearing." The **Department of Insurance** says it is unclear whether this permits a party who has not engaged in discovery to get the actual exhibits or documents to be used as evidence, or merely a list of them. Exhibit p. 95. The draft statute provides for

exchange of the exhibits or documents themselves. The staff would modify the Comment to say that, under subdivision (i):

> The prehearing conference is limited to an exchange of ~~information concerning evidence~~ witness lists and of exhibits or documents to be offered in evidence at the hearing.

The **State Bar Litigation Section** would add the possibility of alternative dispute resolution to the matters authorized to be covered at a prehearing conference. Exhibit p. 162. The staff agrees, and would add a new subdivision to Section 646.130:

> 646.130. A prehearing conference may deal with one or more of the following matters:
>
> . . . .
>
> ( ) Exploration of the possibility of using alternative dispute resolution.

§ 646.210. Settlement

Section 646.210 authorizes settlement at any time for most cases, but only after issuance of an agency pleading in a proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned. The **Department of Health Services** asks what "occupational license" means, and whether it includes teachers, health facilities administrators, certified nurse assistants, radiation technologists, laboratory technologists, and realtors, or whether it is limited to licensees under the jurisdiction of the Department of Consumer Affairs. Exhibit p. 23. See also discussion under Section 648.310, *infra*. The Tentative Recommendation explains an occupational licensing case may be settled only after the agency pleading "to ensure that the disciplinary action is a matter of public record." Therefore "occupational license" should be construed broadly to include all the categories mentioned by the Department, and not be limited to licenses issued by the Department of Consumer Affairs. We could add the following to the Comment:

> "Occupational license" refers to one issued by any agency, not merely those issued by agencies under the jurisdiction of the Department of Consumer Affairs.

The **State Water Resources Control Board** says the provisions authorizing settlement, and authorizing the presiding officer to order the parties to

participate in a settlement conference, should be subject to modification by agency regulation. Exhibit p. 87. The staff recommends against this change. Even without a statute, agencies have implied power to settle a case. Some agencies encourage settlements and others do not. California Administrative Hearing Practice, *supra*, § 2.105, at 136. Under existing law, agencies may use the prehearing conference to explore settlement possibilities. Gov't Code § 11511.5. The staff is reluctant to see these useful pro-settlement provisions weakened. The Water Resources Control Board will be able to use the agency hearing procedure, and so will likely be unaffected by this provision.

The **Water Resources Control Board** is also concerned the provision permitting parties to settle on any terms they believe appropriate may be abused. Some agencies contend they may take action as part of a settlement which would otherwise be beyond the agency's statutory authority. Exhibit pp. 87-88. But it is not easy to draft language to address this problem. We do not want to change the existing rule that a settlement may include sanctions the agency otherwise lacks power to impose. California Administrative Hearing Practice, *supra*. The Comment to Section 646.210 makes clear parties may not make a settlement that overrides all other statutes. It says the section "is subject to a specific statute to the contrary governing the matter," citing the statute requiring a workers' compensation settlement to be approved by the board or a workers' compensation judge. The staff will ask the Water Resources Control Board if they can suggest narrowly tailored language to address this problem.

The **State Personnel Board** asks us to preserve its authority under Government Code Section 18681 to approve settlements. Exhibit p. 112. The staff agrees.

§ 646.220. Mandatory settlement conference

• Subdivision (b) of Section 646.220 requires the presiding officer at the settlement conference to be different from the presiding officer at the hearing, if the proceeding is conducted by an ALJ from OAH. For non-OAH proceedings, one presiding officer may conduct both the settlement conference and the hearing. The **State Bar Committee on Administration of Justice** would require different presiding officers both for OAH and non-OAH proceedings. Exhibit p. 152. The argument for CAJ's position is that, since evidence of settlement negotiations is not admissible at the hearing (California Administrative Hearing Practice, *supra*, § 2.106, at 137; proposed Section 646.230), the officer who will

preside at the hearing should not be informed about the negotiations. The argument against CAJ's position is that to require a separate cadre of settlement judges for non-OAH proceedings will increase costs. The staff is inclined not to implement this suggestion.

Subdivision (d) says the presiding officer "may" conduct the settlement conference by telephone. CAJ would "require use of telephonic conferences when available." Exhibit p. 152. But including the words "when available" or would undercut the attempt to make the provision mandatory, making it precatory only and therefore without teeth. In any event, the staff thinks it is better to keep the discretionary aspect of this provision.

§ 646.230. Confidentiality of settlement communications

Section 646.230 protects confidentiality of settlement negotiations by making evidence of them inadmissible. The **Pacific Gas and Electric Company** wants to permit parties to make a nondisclosure agreement that goes beyond the admissibility question. Exhibit p. 92. But the use of stipulations in administrative proceedings is well-established, and stipulations are usually binding on judicial review. California Administrative Hearing Practice, *supra*, § 2.104, at 135-36. The staff is reluctant to codify one limited application of a stipulation, and a general statute on stipulations seems unnecessary. We could put the following in the Comment:

> The parties are, of course, free to make a stipulation concerning confidentiality of offers of compromise or settlement that go beyond or otherwise vary the protection of this section.

§ 647.210. Application of article

The **Department of Health Services** thinks Section 647.210 is unclear. Exhibit pp. 23-24. Subdivision (b) says, "By regulation an agency may make this article inapplicable." We could amplify this subdivision by adding the following to the Comment:

> If there is no statute requiring the agency to use mediation or arbitration, this article applies unless the agency makes it inapplicable by regulation under subdivision (b). Subdivision (b) only permits an agency to make this article inapplicable, not to modify it. But, under Section 647.230, an agency that does not make this article inapplicable may modify model regulations promulgated by the Office of Administrative Hearings.

• Perhaps we could delete subdivision (b) entirely without losing anything. Section 647.220 is permissive (agency "may" refer dispute to ADR), and Section 647.230 requires model regulations by OAH which may be modified or made inapplicable by agency regulation. So it seems to matter little whether an agency issues a regulation to make this article inapplicable.

The **State Bar Committee on Administration of Justice** "questions why an agency should be able to pass ADR and recommends that the section be eliminated." Exhibit p. 151. Perhaps CAJ means only to eliminate subdivision (b), the opt-out provision. But eliminating subdivision (b) will not make use of ADR mandatory. Section 647.220, the substantive section, is permissive: An agency "may, with the consent of all the parties," refer a dispute to mediation or arbitration.

§ 647.220. ADR authorized

The **State Bar Committee on Administration of Justice** says that by specifying the kinds of ADR that are permitted (mediation and binding and non-binding arbitration), Section 647.220 prevents the use of other kinds, which is unnecessary when the parties are in agreement. Exhibit p. 151. But CAJ does not suggest what other kinds of ADR we may have overlooked. An open-ended statute is undesirable, because OAH must promulgate model regulations and therefore must know what the regulations will cover.

The **State Bar Litigation Section** has several concerns with Section 647.220 (Exhibit p. 162-63):

(1) The State Bar Section says the section permits an agency to require ADR "even over the opposition of all parties." But it does exactly the opposite. It requires "consent of all the parties" before ADR may be required.

(2) ADR may be required by the "agency," defined broadly in Section 610.190 to include employees and other persons purporting to act under the authority of the agency head. The staff believes this does not create an opportunity for abuse, because consent of all parties is required for ADR.

• (3) Subdivision (b), which permits the parties to agree to binding arbitration, "may be constitutionally indefensible" because the state gives up its statutory decision-making authority to "unspecified private decision makers." In civil proceedings, an arbitration agreement is a consent of the parties to the jurisdiction of the courts to enforce the agreement, Code Civ. Proc. § 1293, and this has been uniformly upheld by the courts. But it is not clear what would

happen after a binding arbitration award in an administrative proceeding. Would it preclude administrative review? Would this encroach on the statutory authority of the agency? Under Government Code Section 7, whenever a power is granted to, or a duty is imposed on, a public officer, the power may be exercised or the duty performed by a person authorized by the officer pursuant to law. This seems to say a statute, such as Section 647.220, may provide for delegation to an arbitrator of power to decide. See generally California Administrative Hearing Practice, *supra*, § 4,1, at 216. This may or may not be good policy. Does the Commission wish to reconsider the proposed authority for resolving an administrative proceeding by binding arbitration?

§ 647.240. Confidentiality and admissibility of ADR communications

• The **State Bar Committee on Administration of Justice** likes this section, but is concerned that "the immunity provision is unnecessarily limited to mediators and arbitrators." Exhibit p. 151. CAJ may be referring to subdivision (c), which prevents later testimony about ADR. We could add "or other person" to subdivision (c):

> (c) No presiding officer, arbitrator, ~~or~~ mediator , or other person is competent to testify in a subsequent administrative or civil proceeding as to a statement, conduct, decision, or order occurring at or in conjunction with the dispute resolution.

The **State Bar Litigation Section** is concerned about subdivision (a), which creates a privilege for statements, admissions, and documents used in mediation. The Section opposes keeping agency action from public scrutiny. Exhibit p. 162. But this provision is consistent with the general rule of confidentiality in mediation. See Evid. Code § 1152.5. It is only a "communication" made in mediation that is protected, not the fact of agency action. There will be an agency pleading and other steps in the proceeding before mediation. Although public policy favors open hearings, California law has many exceptions permitting closed hearings, especially for matters in litigation. California Administrative Hearing Practice, *supra*, § 3.4, at 155-56. All privileges in the Evidence Code apply to administrative hearings. *Id.* § 3.50, at 194. The staff would keep the mediation privilege in the draft statute.

§ 648.120. Consolidation and severance

The **State Bar Litigation Section** approves Section 648.120, but is concerned about the statement in the Comment that the section is broad enough "to enable an agency to employ class action procedures." Exhibit pp. 173-174. The Section "vigorously opposes" any such suggestion. In the absence of an express statutory provision affording class relief, class relief is not available in administrative proceedings. *Cf.* Ramos v. County of Madera, 4 Cal. 3d 685, 690-91, 484 P.2d 93, 94 Cal. Rptr. 421 (1971); *but see* California Administrative Hearing Practice, *supra*, § 4.71 (exhaustion of remedies doctrine does not bar class action for declaratory relief). The staff agrees that this statement in the Comment may be troublesome. We would delete it.

§ 648.130. Default

Subdivision (c) permits the agency or the presiding officer to grant a hearing despite a default. The **California Public Employees' Retirement System** is concerned about the possibility of conflicting orders, one by the agency and another by the presiding officer. PERS would say the agency's order controls as under Section 648.120 (consolidation and severance). Exhibit p. 207. But since the order is made without a motion, the possibility of conflicting orders seems remote. The staff would validate the order granting relief from default without regard to who makes it, consistent with a strong policy favoring such relief.

Subdivision (d) permits relief from default on motion for "good cause," which includes failure to receive notice, and "mistake, inadvertence, surprise, or excusable neglect." The **Department of Social Services** is concerned that the express reference to "mistake, inadvertence, surprise, or excusable neglect" will take away agency discretion in such cases, and require relief from default in every such case. Exhibit pp. 139-140. The staff does not agree. The statute is clear that the "agency in its discretion may" grant relief. The "mistake, inadvertence, surprise, or excusable neglect" language is identical to Code of Civil Procedure Section 473. The remedial provisions of Section 473 are highly favored and liberally applied, but the court still has discretion to deny relief. See 8 B. Witkin, California Procedure *Attack on Judgment in Trial Court* §§ 143-166, at 545-71 (3d ed. 1985). The staff would not change this provision.

The **Department of Social Services** says existing law is unclear on how an agency takes a person's default. Exhibit. p. 140. Under Section 648.130, a default is a waiver of the defaulting person's right to a hearing, the agency may take

action based on the person's express admissions or on other evidence, and affidavits may be used as evidence without notice to the person. If the burden of proof is on the agency, e.g., in disciplinary hearings, the agency must base its action on some type of evidence. California Administrative Hearing Practice, *supra*, § 2.40, at 80. If the burden of proof is on the defaulting person, the agency may act without taking any evidence. Section 648.130. The staff thinks these provisions are satisfactory.

§ 648.140. Open hearings

• The **State Personnel Board** is concerned about how the open hearing rule affects exclusion of witnesses where credibility is in issue. Exhibit p. 113. There is no case law on exclusion of witnesses in administrative proceedings. California Administrative Hearing Practice, *supra*, § 3.67, at 207. This treatise recommends following the rule for court actions, where the court may exclude witnesses other than parties. Evid. Code § 777. The staff would codify this rule for administrative proceedings by adding a section, drawn from Evidence Code Section 777, in the article on witnesses:

> 648.355. (a) Subject to subdivisions (b) and (c), the presiding officer may exclude from the hearing any witness not at the time under examination so that the witness cannot hear the testimony of other witnesses.
>
> (b) A party to the proceeding cannot be excluded under this section.
>
> (c) If a person other than a natural person is a party to the action, an officer or employee designated by its attorney is entitled to be present.

The State Water Resources Control Board says the statute should address the question of when proceedings may be closed to the public to consider a settlement proposal, citing Funeral Security Plans, Inc. v. State Board of Funeral Directors, 21 Cal. Rptr. 2d 92, *Supreme Court review granted*, 24 Cal. Rptr. 2d 73 (1993). Exhibit p. 88. This case construed the Bagley-Keene Open Meeting Act which permits a closed session to "confer with legal counsel regarding pending litigation." Gov't Code § 11126(q). This question is not governed by the open hearings requirement of Section 648.140, because an agency's deliberation on settlement is not an adjudicative "hearing." The staff would not revise the Open Meeting Act as part of our APA recommendation. We could revise the first paragraph of the Comment to Section 648.140 as follows:

Section 648.140 supplements the Bagley-Keene Open Meeting Act, Government Code §§ 11120-11132. Closure of a hearing should be done only to the extent necessary under this section, taking into account the substantial public interest in open proceedings. It should be noted that under the Open Meeting Law, deliberations on a decision to be reached based on evidence introduced in an adjudicative proceeding may be made in closed session. Section 11126(d). And under the Open Meeting Law, a settlement proposal may be considered by the agency in closed session if sustains its substantial burden of showing the prejudice to be suffered from conducting an open meeting. Section 11126(d), (q).

§ 648.150. Hearing by electronic means

Section 648.150 permits hearings by telephone, television, or other electronic means if participants have an opportunity to "observe exhibits." The **State Bar Litigation Section** would provide for an exchange of exhibits before the hearing for inspection and possible objection. Exhibit p. 174. This is provided by the discovery provisions, under which a party may obtain all exhibits by a written request. Sections 645.210, 645.230.

The **State Bar Litigation Section** is concerned about the possibility of prejudice to an intimidated or inarticulate witness who testifies by telephone or other electronic means, where the presiding officer cannot observe demeanor. Exhibit p. 174. But subdivision (b) addresses this problem by prohibiting a hearing by electronic means if it will impair a proper determination of credibility.

The **State Bar Litigation Section** is also concerned about the extra cost in making a preliminary appearance to argue whether an electronic hearing should or should not be held. Exhibit p. 174.

§ 648.310. Burden of proof

• **Robert Hughes** objects to permitting agencies to provide by regulation for a burden of proof other than "clear and convincing" in occupational licensing cases. Exhibit p. 77. Mr. Hughes appears to have a good point. The "clear and convincing proof" standard in proceedings for revocation or suspension of a professional license is established by case law. Ettinger v. Board of Medical Quality Assurance, 135 Cal. App. 3d 853, 856, 185 Cal. Rptr. 601 (1982) (suspension of doctor's license); Realty Projects, Inc. v. Smith, 32 Cal. App. 3d 204, 212-13, 108 Cal. Rptr. 71 (revocation of real estate license); 1 G. Ogden, *supra*, § 39.04[2]. The reason clear and convincing proof is required in professional

license cases is that vested rights are involved. Ettinger v. Board of Medical Quality Assurance, *supra*, 135 Cal. App. 3d at 857. The clear and convincing proof standard has not been extended to lesser forms of discipline, such as public reproval or termination of a particular employment. Ettinger v. Board of Medical Quality Assurance, supra, 135 Cal. App. 3d at 857; 1 G. Ogden, *supra*. The staff would delete the authority for agencies to change the "clear and convincing" standard, and would limit that standard to proceedings for revocation or suspension of a license, and not apply it to lesser forms of discipline:

> (b) In an adjudicative proceeding to determine whether an occupational license should be revoked ~~,~~ or suspended, ~~limited, or conditioned,~~ the burden of proof is clear and convincing proof ~~unless by regulation the agency provides a different burden~~.

The **Department of Insurance** asks that a "preponderance of the evidence" standard be applied to insurance licensing cases. Exhibit p. 96. The staff is not persuaded there should be a lesser standard of proof for revocation of a license to sell insurance (Ins. Code § 1738) than for a license to practice medicine or sell real estate.

• The **Department of Health Services, Alcoholic Beverage Control Appeals Board**, and **Department of Social Services** ask what "occupational license" means in subdivision (b). Exhibit pp. 24, 104, 140. See also discussion under Section 646.210, *supra*. Does it apply to a license from the Department of Social Services to operate a community care facility? Health and Safety Code Section 1551 requires a preponderance of the evidence to revoke or suspend a license to operate a community care facility. These licenses appear to be to operate a particular facility. Suspension of a license to operate a particular community care facility is analogous to dismissal of a teacher from a particular employment, not analogous to revocation of a teaching credential which deprives the teacher from pursuing his or her profession, and therefore a preponderance of evidence standard should apply. See Gardner v. Commission on Professional Competence, 164 Cal. App. 3d 1035, 1039-40, 210 Cal. Rptr. 795 (1985). The staff would clarify this by adding to the definitions a section defining "occupational license":

§ 610.400. Occupational license

> 610.400. "Occupational license" means a license without which the licensee would be unable to pursue the licensee's profession.

Comment. Section 610.400 codifies the definition of "occupational license" used in Gardner v. Commission on Professional Competence, 164 Cal. App. 3d 1035, 1039-40, 210 Cal. Rptr. 795 (1985), and Ettinger v. Board of Medical Quality Assurance, 135 Cal. App. 3d 853, 857, 185 Cal. Rptr. 601 (1982). "Occupational license" is used in Section 648.310 (burden of proof). "Occupational license" does not include a license to operate a community care facility under the Health and Safety Code, because the license is to operate a particular facility, and suspension or revocation of the license would not deprive the licensee of the right to pursue his or her profession.

The **California Public Employees' Retirement System** asks how subdivision (a), which places the burden of proof on the "proponent of a matter," applies to an application by a disability retiree for reinstatement to active employment. Exhibit p. 207. PERS says existing case law is unclear. It appears subdivision (a) would place the burden of proof on the applicant.

§ 648.320. Presentation of testimony

Subdivision (b) of Section 648.320 permits a party or person identified with a party to be called at any time and examined as if under cross-examination. The **Department of Health Services** says it may be unfair to permit the agency to call respondent as an adverse witness during the agency's case-in-chief. The Department says most ALJ's disfavor this practice so the respondent can tell a cohesive story on direct examination first before being subjected to cross-examination. The Department suggests statutory language to achieve this. Exhibit p. 24. In administrative hearings as in civil practice generally, "the order of proof is largely within the discretion of the trier of fact." California Administrative Hearing Practice, *supra*, § 3.20, at 168. But subdivision (b) is virtually identical to the civil practice rule under Evidence Code Section 776, which apparently makes calling an adverse witness during the proponent's case-in-chief a matter of right, not subject to court discretion to regulate the order of proof. See 3 B. Witkin, Evidence *Introduction of Evidence at Trial* § 1860, at 1814 (3d ed. 1986). The staff thinks it is better policy to depart from civil practice and make clear the presiding officer does have discretion to regulate this practice. We would do this by revising subdivision (b) as follows:

> (b) ~~A~~ Subject to the discretion of the presiding officer to regulate the order of proof, a party or person identified with a party may be called and examined as if under cross-examination by an adverse party at any time during the presentation of evidence by the party calling the witness.

§ 648.330. Oral and written testimony

The **Department of Insurance** asks what portion of subdivision (c) the words "if available" modify. Exhibit p. 96. The staff would clarify this by revising subdivision (c) as follows:

> (c) Documentary evidence may be received in the form of a copy or excerpt. On request, parties shall be given an opportunity to compare the copy with the original if available, and to compare an excerpt with the complete text if available.

The **Department of Insurance** also asks what "if available" means. Does this mean available by subpoena or by more informal means? Exhibit p. 96. This language comes from the 1981 Model State APA, and appears to mean available by any means. Under civil practice, a copy of a writing is not made inadmissible by the best evidence rule if the writing was not reasonably procurable by the proponent by use of the court's process or by "other available means." Evid. Code § 1502. Section 648.330 appears to be to the same effect. We could clarify this by adding the following to the Comment:

> As used in subdivision (c), "if available" means if the original or complete text is procurable by process, such as a subpoena duces tecum, or by any other available means.

§ 648.340. Affidavits

Subdivision (d) of Section 648.340 says "affidavit" includes declaration under penalty of perjury as used in this section. The Comment says this is a specific application of the general rule in Code of Civil Procedure Section 2015.5. The **Department of Social Services** is concerned this provision may cast doubt on whether "affidavit" as used elsewhere in the Government Code includes declaration. Exhibit p. 141. The staff thinks this is a good point. The staff would delete subdivision (d) and put it in the Comment, citing Code of Civil Procedure Section 2015.5.

§ 648.350. Protection of child witness

Section 648.350 permits the presiding officer to conduct the hearing in such a way as to protect a child witness from intimidation. The Comment says this codifies an aspect of the *Seering* case. In that case, the operators of a family day care home for children were accused of sexually abusing a child. The operators were excluded from the administrative hearing while the child testified, but were

permitted to view the testimony on closed-circuit television and to confer with their counsel before cross-examination of the child. The court held this did not violate the operators' right to confront the witness.

• The **Department of Health Services** and **Department of Social Services** would expand Section 648.350 to protect developmentally disabled, and perhaps other medically fragile adults. Exhibit pp. 24-25, 141. The Department of Social Services says it has been successful in getting protection for developmentally disabled adults under the *Seering* case. The parallel provision in the Penal Code is limited to sexual offenses where the witness is 10 years of age or younger. Pen. Code § 1347. In criminal cases, there are federal and state constitutional issues affecting the right to a public trial, confront witnesses, and due process. 3 B. Witkin, California Evidence *Introduction of Evidence at Trial* § 1868, at 1821 (1986). The staff has found no case authorizing televised hearings for a developmentally disabled witness. However, the staff is persuaded by the argument that some presiding officers are now extending this protection to developmentally disabled adults. The staff is inclined to include developmentally disabled adults in Section 648.350, but not to go so far as to permit application of the section in any case:

> 648.350. Notwithstanding any other provision of this part, the presiding officer may conduct the hearing, including the manner of examining witnesses and closing the hearing, in a way that is appropriate to protect a child witness, or a witness with a developmental disability as defined in Section 4512 of the Welfare and Institutions Code, from intimidation or other harm, taking into account the rights of all persons.

§ 648.450. Hearsay evidence and the residuum rule

Section 648.450 permits hearsay evidence to supplement or explain other evidence. This otherwise objectionable hearsay evidence that is used to supplement or explain other evidence is referred to as "administrative hearsay." 1 G. Ogden, *supra*, § 38.04[1]. Section 648.450 also says hearsay is not sufficient in itself unless it would be admissible over objection in a civil action. This is called the "residuum rule," because a finding of fact cannot be based on administrative hearsay without a residuum of other evidence that it supplements or explains. *Id.* The **Department of Health Services** says the term "residuum rule" is unknown in its practice, and suggests substituting "administrative hearsay." Exhibit p. 25. First, "residuum rule" is used only in the lead line, not in the

statute. Second, as noted above, "administrative hearsay" and the "residuum rule" are two different rules, so one cannot substitute for the other. The staff is not persuaded the lead line should be changed.

Robert Hughes is opposed to any use of hearsay evidence in administrative hearings. Exhibit p. 76. But the draft statute merely continues existing law. The use of hearsay evidence is well-established in judicial and administrative proceedings. The staff would keep Section 648.450.

The **Alcoholic Beverage Control Appeals Board** asks whether the "other evidence" which hearsay may be used to explain should not be a "cut above " the type of hearsay evidence that is not sufficient in itself. Exhibit p. 104. "Other evidence" refers to non-hearsay evidence. This seems clear enough from the statute, but, if not, we could add the following statement to the Comment:

> As used in subdivision (a), "other evidence" refers to non-hearsay evidence.

• The **Department of Social Services** would add a provision for admission of hearsay evidence drawn from federal rules. Exhibit p. 141. Under Rules 803(24) and 804(b)(5) of the Federal Rules of Evidence, hearsay that does not fall under any exception is admissible where it has equivalent circumstantial guarantees of trustworthiness, is more probative than any other evidence that can be procured through reasonable efforts, and the interests of justice are served by admission of the evidence. Asimow, *The Adjudication Process* 69 n.179 (Oct. 1991). The effect of adopting DSS' suggestion would be to expand the residuum rule but not the administrative hearsay rule. This is because administrative hearsay (to supplement or explain other evidence) is already fully admissible. It is only where hearsay is the only evidence to support a finding, in which case it must be admissible under general civil rules, that DSS' suggestion would have any effect. Should the residuum rule be expanded in this manner? Professor Asimow appears to have taken a neutral position: The federal hearsay rule "could also be applied" on judicial review. *Id.* The staff is inclined not to expand the residuum rule as DSS suggests.

§ 648.460. Unreliable scientific evidence

• Section 648.460 codifies case law applicable to administrative hearings that evidence based on a new scientific method of proof is admissible only if "generally accepted as reliable in the scientific community." Seering v.

Department of Social Services, 194 Cal. App. 3d 298, 307, 311, 239 Cal. Rptr. 422 (1987). This was recommended by Professor Asimow, but he said it was a "tough question," and he noted strong public interest arguments for abandoning the *Seering* limitation. Asimow, The Adjudication Process 61-63 (1991). *Seering* is based on the *Kelly-Frye* test applicable in civil proceedings. The **Department of Health Services** would reexamine Section 648.460 in light of a recent U. S. Supreme Court case, Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993). Exhibit p. 25. *Frye* is a 1923 federal court of appeal case. *Kelly* is a 1976 California Supreme Court case. *Daubert* held *Frye* was superseded by the federal rules of evidence under which all relevant evidence is admissible, except as provided by statute or the Constitution. Under the new federal standard, scientific evidence is admissible if grounded "in the methods and procedures of science." Under *Kelly*, the restrictive "generally accepted" test is still the law in California. But a future California case could apply the reasoning of *Daubert* and say California Evidence Code Section 351 — "[e]xcept as otherwise provided by statute, all relevant evidence is admissible" — compels rejection of *Kelly* and adoption of the new relaxed federal rule under *Daubert*. If we include Section 648.460 in the draft statute to codify the "generally accepted" test, we will preclude a future court from applying the *Daubert* reasoning to relax the "generally accepted" test. For this reason, the staff is inclined to delete Section 648.460 and leave the question of admissibility of scientific evidence to case law development.

§ 648.510. Scope of article [deleted from restructured statute]

Section 648.510, which permitted agency regulations on ex parte communications, is deleted in the restructured statute. Under the restructured state, ex parte communications are not modifiable by regulation for formal and informal hearings. For the agency hearing procedure, the ban on ex parte communications is a key due process protection that cannot be weakened, but can be toughened by regulation. Section 633.030(f). The **State Water Resources Control Board** would keep the authority for modification by regulation of the ex parte communication provisions. Exhibit p. 88. The Water Board believes the "need for flexibility is particularly important for site visits, contacts concerning related projects or proposals for legislation, and briefings by agency staff." Since the Water Board will be able to use the agency hearing procedure, it will be able to toughen, but not weaken, the ex parte communication provisions. But its

point is partly addressed by the recommendation under the next section that ex parte contacts be prohibited only for "matters concerning or affecting the proceeding." On the other hand, site visits or briefings concerning a pending proceeding should be done in the presence of all parties.

Subdivision (c) of Section 648.510 permits agencies by regulation to impose different restrictions on ex parte communications than provided in this article in cases "nonprosecutorial in character." The **Department of Health Services** and **Public Utilities Commission** had concerns about terms in the deleted section. Exhibit pp. 25, 55. This is now moot.

§ 648.520. Ex parte communication prohibited

Section 648.520 prohibits ex parte communications "while the proceeding is pending." The quoted language is also used in Section 648.530. An adjudicative proceeding is commenced by issuance of an agency pleading. Section 642.310. The **State Water Resources Control Board** is concerned this may limit the prohibition against ex parte communications to the case where an agency pleading has been issued, even though an application or complaint has been filed and the agency knows a hearing will be required. The Board says this "makes a sham" of the prohibition. Exhibit p. 88. The staff agrees, and would add a new subdivision (c) to Section 648.520:

> (c) For the purpose of this article, a proceeding is pending from the issuance of an agency pleading, or from the application for an agency decision, whichever is earlier.

• The **State Water Resources Control Board, Department of Health Services, Public Utilities Commission,** and **California Public Employees' Retirement System** say the prohibition against ex parte communications is too broad because it applies to matter outside as well as within the adjudicative proceeding. Exhibit pp. 25-26, 55-56, 88, 208. DHS says ex parte communications unrelated to the proceeding should be permitted, such as whether a proposed new regulation would pose a problem in future cases, or regarding new positions in the hearing office. Exhibit p. 26. The Water Board says flexibility "is particularly important for site visits, contacts concerning related projects or proposals for legislation, and briefings by agency staff." Exhibit p. 88. These provisions were drawn from the 1981 Model State APA, which only applies to communications "regarding

any issue in the proceeding." The staff agrees the statute should be so limited, and would revise subdivision (a) of Section 648.520 as follows:

> 648.520. (a) Except as provided in subdivision (b), while the proceeding is pending there shall be no communication, direct or indirect, on any matter concerning or affecting the proceeding, between the following persons without notice and an opportunity for all parties to participate in the communication:

The **State Bar Committee on Administration of Justice** and **State Bar Litigation Section** are concerned about the exception in Section 648.520 permitting ex parte communications on "a matter of procedure or practice that is not in controversy," saying this exception is too "expansive." Exhibit pp. 149, 169-70. The staff disagrees. The Comment gives examples of communications on "format of pleadings, number of copies required, or manner of service." Ex parte communications of these kinds ought not be prohibited. The California Coastal Act, which applies to the Coastal Commission, has an exception to the prohibition against ex parte communications for one "limited entirely to procedural issues, including, but not limited to, the hearing schedule, location, format, or filing date. Pub. Res. Code § 30322, *as amended by* 1993 Cal. Stat. ch. 798. Rule 5-300 of the State Bar Rules of Professional Conduct prohibits ex parte communications on "the merits" of a pending contested matter. *Accord,* People v. Laue, 130 Cal. App. 3d 1055, 1061, 182 Cal. Rptr. 99 (1982) (no prohibition of ex parte communication to court by defense counsel asking for resentencing proceeding because "not a matter to be heard in open court, nor is it entitled to be placed on the calendar").

• The **State Bar Committee on Administration of Justice** and **State Bar Litigation Section** are also concerned about the exception permitting a communication assisting and advising the presiding officer by an employee, attorney, or other authorized representative of the agency. Exhibit pp. 149, 169-70. The Comment says without this exception Section 648.520 would "preclude a presiding officer from obtaining advice from expert agency personnel even though not involved in the matter under adjudication." This concern is addressed by the limitation proposed above that the prohibited communication must concern or affect the proceeding. Yet the exception still seems useful to permit staff experts who are not prosecuting the case to provide assistance or advice to the presiding officer. Perhaps an acceptable compromise would be to

limit this provision to cases that are nonprosecutorial in character, the same as subdivision (b)(2):

> (b) A communication otherwise prohibited by this section is permissible in any of the following circumstances:
> (1) The proceeding is nonprosecutorial in character and is for the purpose of assistance and advice to the presiding officer by an employee of the agency that is a party or the attorney or other authorized representative of the agency, provided the assistance or advice does not violate Section 643.320 (separation of functions).

§ 648.610. Misconduct in proceeding

Robert Hughes is concerned about the availability of contempt and monetary sanctions for misconduct in the proceedings. He is concerned this may inhibit the constitutional right to litigate energetically. Exhibit pp. 74-76. The staff thinks this point has no merit.

§ 649.110. Proposed and final decisions

The **Unemployment Insurance Appeals Board** says the decision model in this chapter differs drastically from its procedures, in that it functions more like an appellate body to review decisions of the Employment Development Department. Exhibit p. 37. The staff would preserve special statutes relating to issuance of a decision by the UIAB. E.g., Unemp. Ins. Code § 410.

§ 649.120. Form and contents of decision

The **State Teachers Retirement System** objects to the requirement that the presiding officer shall, where credibility of a witness affects the decision, include in the decision evidence of the observed demeanor, manner, or attitude of the witness that supports the credibility determination, but gives no reason for the objection. Exhibit pp. 69-70. This provision is needed, because we are proposing to amend Section 1094.5 of the Code of Civil Procedure to require the court on judicial review to give "great weight" to credibility determinations of the ALJ. We think this is an important reform, and would not change it.

The **State Water Resources Control Board** notes the provisions on form and contents of a decision conflict with the Board's practice and with the Water Code. Exhibit p. 89. The staff would preserve special statutes in the Water Code. The Board can preserve its present practices by designing an appropriate agency hearing procedure. The Water Board is also concerned the requirement of Section 649.120 that the decision must "include a statement of the factual and

legal basis for the decision as to each of the principal controverted issues" could require the agency to explain why it did not take a particular action on an issue, or why the agency did not impose terms and conditions other than those included in the decision. This requirement of Section 649.120 will also apply to the agency hearing procedure. Section 633.030(g). Existing law requires a decision to contain "findings of fact, a determination of the issues presented and the penalty, if any." Gov't Code § 11518. The staff would address this by revising the second paragraph of the Comment as follows:

> Subdivision (a) is drawn from the first sentence of 1981 Model State APA § 4-215(c). The decision must be supported by findings that link the evidence in the proceeding to the ultimate decision. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 113 Cal. Rptr. 836 (1974). The requirement that the decision must include a statement of the basis for the decision is particularly significant when an agency develops new policy through the adjudication of specific cases rather than through rulemaking. Articulation of the basis for the agency's decision facilitates administrative and judicial review, helps clarify the effect of any precedential decision, see Article 3 (commencing with Section 649.310), and focuses attention on questions that the agency should address in subsequent rulemaking to supersede the policy that has been developed through adjudicative proceedings. The decision must only explain its actual basis. It need not eliminate other possible bases that could have been, but were not, relied upon as the basis for the decision. Thus, for example, if the decision imposes terms and conditions, it need not explain why other terms and conditions were not imposed.

The **State Bar Litigation Section** approves Section 649.120, especially subdivision (c) codifying case law that the decision must be based exclusively on the record. Exhibit p. 169.

§ 649.130. Issuance of proposed decision

The **Unemployment Insurance Appeals Board** says Section 649.130 does not fit its current procedures. Exhibit p. 37. As noted under Section 649.110, *supra*, the staff would preserve UIAB's special statutes. E.g., Unemp. Ins. Code § 410.

§ 649.140. Adoption of proposed decision

• The **Department of Health Services** would permit the agency head summarily to adopt the proposed decision with a disclaimer disagreeing with

erroneous reasoning. This would be useful in cases too small to remand, or which reach the right result for the wrong reason. Exhibit pp. 26-27. The staff agrees, and would add the following to paragraph (1) of subdivision (a), authorizing the agency head to:

> (1) Adopt the proposed decision in its entirety as a final decision. For the guidance of the parties and the public in future disputes, the agency head may include an explanation which expresses disagreement with all or part of the decision. The expression of disagreement does not affect the validity of the decision.

The **Unemployment Insurance Appeals Board** says Section 649.140 does not fit its current procedures. Exhibit p. 37. As noted under Sections 649.110 and 649.130, *supra*, the staff would preserve UIAB's special statutes. E.g., Unemp. Ins. Code § 410.

§ 649.150. Time proposed decision becomes final

The **Unemployment Insurance Appeals Board** says Section 649.150 does not fit its current procedures. Exhibit p. 37. As noted under Sections 649.110, 649.130, and 649.140, *supra*, the staff would preserve UIAB's special statutes. E.g., Unemp. Ins. Code § 410. UIAB notes that, in the introductory clause, "Article 8" should read "Article 2." This is corrected in the restructured statute.

The **State Water Resources Control Board** notes this section conflicts with the Board's practice and with the Water Code. Exhibit p. 89. The staff would preserve the special statutes in the Water Code.

§ 649.160. Service of final decision on parties

Section 649.160 requires a final decision to state the time within which judicial review must be initiated. Failure to do so extends the time to six months after service of the decision. The **California Energy Commission** wants to preserve its statute on judicial review, Public Resources Code Section 25901 (review within 30 days after Commission decision). Exhibit p. 125-126. The staff agrees. We will preserve that statute, and add the following to the Comment to Section 649.160:

> Other special statutes that prescribe time periods for issuing and serving a final decision control over Section 649.160. See Section 612.140 (statute applicable to particular agency or proceeding controls over this division). For such special statutes, see, e.g., Pub. Res. Code § 25901.

The staff will consider whether a list of other statutes that control over the APA should be added to the Comment to Section 612.140, although that list will be very lengthy.

§ 649.210. Availability and scope of review

The **Department of Health Services** and **State Personnel Board** are confused by the authority to review a "final" decision. Exhibit pp. 27, 115-116. An agency head may summarily adopt a proposed decision as a final decision (Section 649.140), but this does not preclude administrative review: A party has 30 days after service of the proposed decision to petition for administrative review. It is necessary for a "final" decision to be reviewable, because otherwise the agency could preclude review by summarily adopting the proposed decision. This is a little confusing, because "final" in this context does not have the same meaning as "final" in the context of judicial review. See Code Civ. Proc. §§ 1094.5(a), 1094.6(b); California Administrative Hearing Practice, *supra*, § 4.67, at 266; 2 G. Ogden, *supra*, §§ 50.03[3][b], 51.01[3][b]. We could clarify this by adding the following to the Comment:

> Under Section 649.210, a final decision (e.g., a proposed decision summarily adopted as a final decision by the agency head under Section 649.140) is subject to administrative review. For this purpose, "final" has a broader meaning than for the purpose of judicial review. See Code Civ. Proc. §§ 1094.5, 1094.6.

The **State Water Resources Control Board** notes this section conflicts with the Board's practice and with the Water Code. Exhibit p. 89-90. The staff would preserve the special statutes in the Water Code, and the Board will have authority to adopt an agency hearing procedure.

The **State Personnel Board** says the draft statute may conflict with its authority under Article VII, Section 3(a), of the California Constitution, which says "The Board shall enforce the civil statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary action." Exhibit p. 116. This appears to require preservation of the Board's special statutes in Government Code Sections 19586-19588.

The **State Bar Committee on Administration of Justice** and **State Bar Litigation Section** object to changing administrative review from a matter of right to a matter of agency discretion. Exhibit pp. 147-48, 167-68. But under

existing law administrative review appears to be discretionary: The agency "may" adopt a proposed decision without reviewing the record, or "may" itself decide the case on the record, including the transcript. Gov't Code § 11517. There is no right to file opposition to a proposed decision, although there is a right to present written or oral argument when an agency rejects a proposed decision and decides a case from the transcript. California Administrative Hearing Practice, *supra*, § 4.10, at 223. The right to present oral or written argument is preserved in Section 649.230. Thus the draft statute does not appear to make significant changes in existing law on the right to administrative review.

§ 649.220. Initiation of review

The **State Personnel Board** asks whether the agency first grants or denies a petition for rehearing, and reviews the case only if the petition for rehearing has been granted, or whether the agency does not even act on the petition for rehearing until the record is prepared and the issues briefed and argued. Exhibit p. 116. Under existing law, an agency may, but need not, afford an opportunity for a rehearing. See Gov't Code § 11521; California Administrative Hearing Practice, *supra*, § 4.55, at 255. The time within which judicial review must be sought is measured from the last day on which reconsideration can be ordered, but failure to seek reconsideration does not affect the right to judicial review. Gov't Code § 11523. We will consider and dispose of this provision in connection with judicial review.

§ 649.230. Review procedure

• Section 649.230 changes the rule of Government Code Section 11517(c) permitting the reviewing agency to take additional evidence. Under the draft statute, the only evidence that may be taken on review is that which could not have been produced at the hearing in the exercise of reasonable diligence. The **State Teachers Retirement System** objects to this change. Exhibit p. 69. This was recommended by Professor Asimow to strengthen the fact-finding role of the hearing officer by no longer allowing agency heads to reject an ALJ decision and rehear the case themselves. Asimow, Appeals Within the Agency: The Relationship Between Agency Heads and ALJs 25, 30 (August 1990). If additional evidence is needed, the agency head should remand for further proceedings. The staff recommends no change in this provision.

• The **Department of Health Services** and **California Energy Commission** want statutory language to make clear the cost of making a copy of the record "available to the parties" may be imposed on the party requesting the copy. Exhibit pp. 27, 126. The Comment says this provision "requires only that the record be made available to the parties. The cost of providing a copy of the record is a matter left to the discretion of each agency as appropriate for its situation." The staff has no objection to codifying this with language drawn from the Public Records Act (Gov't Code § 6257):

> 649.230. (a) The reviewing authority shall decide the case on the record, including a transcript or summary of evidence, a recording of proceedings, or other record used by the agency, of the portions of the proceeding under review that the reviewing authority considers necessary. A copy of the record shall be made available to the parties. The agency may require payment of fees covering direct costs of making the copy. The reviewing authority may take additional evidence that, in the exercise of reasonable diligence, could not have been produced at the hearing.

• The **Unemployment Insurance Appeals Board** is concerned the provision requiring the reviewing authority to "allow each party an opportunity to present a written brief or an oral argument as determined by the reviewing authority" merely requires more regulations, especially since forms are treated as regulations and must be submitted for OAL review. Exhibit p. 38. The language permitting written or oral argument is in existing law. Gov't Code § 11517. The only new language is the last portion — "as determined by the reviewing authority." We could perhaps reduce the need for regulations by revising subdivision (b) as follows:

> (b) The reviewing authority shall allow each party an opportunity to present a written brief or , if the agency permits, an oral argument ~~as determined by the reviewing authority~~.

The **State Personnel Board** asks how the review procedure fits with the rehearing procedure. Exhibit p. 116. This is discussed under Section 649.220, *supra*.

The **Department of Social Services** is concerned the agency might have to order the entire transcript merely to increase the severity of a recommended penalty. Exhibit p. 141. An agency decision to increase a penalty suggested in a proposed decision is a rejection of the decision, and the agency should follow the

rules for rejection (California Administrative Hearing Practice, *supra,* § 4.18, at 228), i.e., preparing the record with a transcript. Gov't Code § 11517. But Section 649.230 requires a transcript or summary of evidence only "of the portions of the proceeding under review that the reviewing authority considers necessary." This appears to solve DSS' problem.

§ 649.240. Decision or remand

The **Department of Health Services** is concerned about vagueness in the provision permitting an agency to "[r]eject the proposed or final decision, without remand," and requiring the agency to "dispose of the proceeding within a reasonable time after rejection." The Department says "[a]llowing an agency to reject a decision without substituting anything for it is very strange in the normal adjudicative context." Exhibit pp. 27-28. But the draft statute does require the agency to "dispose" of the proceedings in the manner provided in Section 649.230. And existing law does not require the agency to do anything after rejection of a proposed decision: If the agency does not adopt the proposed decision, the agency "may" decide the case or "may" remand it. Gov't Code § 11517. The staff sees no problem with this provision.

§ 649.310. Precedential effect of decision

The **State Water Resources Control Board** wants to be able to modify the precedent decision provisions by regulation. Exhibit p. 90. The Board wants to continue its practice of designating all of its decisions as precedential. The Water Board will be able to use the agency hearing procedure, one requirement of which is that the agency must designate and index significant decisions as precedent. Section 633.030(h). Agencies may adopt regulations equivalent to or more protective than the formal hearing procedure. Comment to Section 633.030. So all decisions, whether or not "significant," may be designated as precedent under the agency hearing procedure. For agencies that cannot adopt the agency hearing procedure, the draft statute appears to permit designation of all decisions as precedential, requiring only that the agency designate as precedent a decision "that contains a significant legal or policy determination of general application that is likely to recur." An agency's designating or failing to designate a decision as precedent is not subject to judicial review, so this article is precatory only. There is nothing in the article to prevent an agency from designating all of its decisions as precedent.

The Water Board also wants to be free of the indexing requirement. The Board and **Public Utilities Commission** think electronic services such as LEXIS or Westlaw are a better way to make precedent available than an indexing system. Exhibit pp. 58-59, 90. But not everyone has access to LEXIS or Westlaw. Section 649.330 requires the index to be made available to the public by subscription, so the indexing system could be made financially self-supporting.

The **Department of Social Services** says the authority to adopt precedent decisions "will be a valuable resource both to the agencies and the public." Exhibit p. 142.

§ 649.320. Designation of precedent decision

Subdivision (b) of Section 649.320 says designation of a decision as precedent is exempt from rule-making provisions of the APA. The Comment says this "applies notwithstanding any contrary implication in Section 11347.5" of the rule-making APA. The **Office of Administrative Law** objects to the Comment as not reflecting existing law, citing Professor Ogden's treatise. Exhibit pp. 102-103. The Ogden treatise says it is an open question whether statutorily created precedent decisions are permissible without express statutory exemption from the rule-making provisions. But that is exactly what subdivision (b) does. The Comment is an accurate statement of the effect of subdivision (b). It is not a statement of general law. The staff would revise the first sentence of the second paragraph of the Comment as follows:

> ~~This~~ Under subdivision (b), this section applies notwithstanding any contrary implication in Section 11347.5 ("underground regulations").

§ 650.130. Probation

Section 650.130 allows terms of probation to require restitution to a person damaged by a breach of contract. The **Department of Insurance** asks whether an agency must specifically allege breach of contract in its pleading. Exhibit p. 96. Section 642.320 requires the agency's pleading to include a statement of the issues to be determined, including any acts or omissions with which the person is charged. So if breach of contract is an issue in the proceeding, it should be pleaded.

Bus. & Prof. Code § 494.5. Reinstatement of license or reduction of penalty

Section 494.5 recodifies Section 11522 of the Government Code. The **Department of Insurance** wants to make sure the section applies to persons licensed under other codes, not just under the Business and Professions Code. Exhibit p. 96. We could make this clear by saying in the Comment that "Section 494.5 applies to persons licensed under other codes as well as under the Business and Professions Code," or we could restore this section to the APA as follows:

> **650.140. Reinstatement of license or reduction of penalty**
>
> 650.140. (a) A person whose license has been revoked or suspended may petition the agency for reinstatement or reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition.
>
> (b) The agency shall give notice to the Attorney General of the filing of the petition. The Attorney General and the petitioner shall be afforded an opportunity to present written argument, or if the agency permits, oral argument, before the agency itself.
>
> (c) The agency itself shall decide the petition. The decision shall include the reasons therefor.
>
> **Comment.** Section 650.140 supersedes the first three sentences of former Section 11522. The last sentence of former Section 11522 is continued in substance in Section 612.150 (contrary express statute controls).

Gov't Code § 11340.4 (added). Study of administrative rulemaking

• Existing law gives OAH authority to study administrative law and procedure. Gov't Code § 11370.5. The draft statute splits this into two parts, giving OAH authority to study administrative adjudication (Section 636.180), and giving OAL authority to study administrative rulemaking. The statute requires agencies to allow OAL access to agency records, and requires OAL to submit suggestions to agencies and to report biennially to the Governor and Legislature. Proposed Section 11340.4. The **Unemployment Insurance Appeals Board** and **Department of Social Services** are concerned this will convert OAL into an investigative agency, and that OAL will use this opportunity to ferret out underground regulations and require them to be adopted as rules. Exhibit pp. 36, 38, 142. Existing law already permits OAL to determine if an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation for purpose of its review authority. Gov't Code § 11347.5. OAL may act whether it is notified of an underground regulation or learns on its own. *Id.* The proposed new requirement in Section

11340.4 that agencies must give OAL access to their records is consistent with the existing function of OAL to determine whether underground regulations should be subjected to the rulemaking process. The staff would not change this section.

Gov't Code § 20133. Public Employees Retirement Law

The **California Public Employees' Retirement System** notes Government Code Section 20133 will need a conforming revision. Exhibit p. 203.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

ASSOCIATION OF CALIFORNIA STATE ATTORNEYS AND ADMINISTRATIVE LAW JUDGES

June 17, 1993

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Re: Administrative Procedure Act

Dear Mr. Sterling:

On behalf of our Administrative Law Judges who will be working under the new Administrative Procedure Act, which your Commission is now revising, ACSA proposes a very minor change that would both clear up existing confusion over the role of the Office of Administrative Hearings and enhance the perception of fairness to the public which is the sine qua non of any adjudicatory process. ACSA proposes that the name of the Office of Administrative Hearings be changed to the Administrative Law Court. While not a change in substance, it is necessary to accurately reflect the function and duties of the judges as well as provide to the public the sense of fair play in the administrative arena that is certainly created in the civil courts.

As you are undoubtedly aware, the entire purpose of having a central panel of Administrative Law Judges (ALJ) is to ensure that an impartial fact finder is available to preserve the due process rights of those brought before state agencies for disciplinary purposes. The ALJs do that job well; however, there is still the perception that the ALJs are not independent because they are but a small state agency subsumed within a larger one.

Over the years, the Office of Administrative Hearings has taken great pains to ensure all who come before it that the litigants will receive a fair hearing. One problem, of course, is that the general public has no conception what an administrative proceeding is. One major step in putting forth the notion that a fair hearing could be had in front of a state agency was in the creation of the Office of Administrative Hearings itself. Re-classifying the "hearing officers" as Administrative Law Judges was another major step in developing the appearance of impartiality. Another significant step was requiring the use of

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judicial robes. Additionally, dramatically increasing the attendance by the ALJs at the National Judicial College helped ensure that the ALJs were not only perceived as fair, competent and impartial, but were and are so in fact.

Support for the name change to "Administrative Law Court" can be found in case law as well. The Office of Administrative Hearings clearly acts as a court. In Imen v. Glassford (1988) 201 Cal.App.3d 898, the Court of Appeal for the Fourth Appellate District found that administrative proceedings to revoke an occupational license, held before the Office of Administrative Hearings, were judicial in character and thus contained all of the elements necessary for the application of the doctrine of collateral estoppel in a subsequent civil proceeding. The appellate court noted at page 907 that the administrative hearing "possessed a 'judicial character'" because, among other things, the proceeding conducted by the Administrative Law Judge was (1) conducted in a judicial like adversary setting; (2) the proceeding required witnesses to testify under oath; (3) the determination involved the adjudicatory application of rules to a single set of facts; (4) the proceedings were conducted before an impartial Administrative Law Judge; (5) the parties had the right to subpoena witnesses and present documentary evidence; (6) a verbatim record of the proceedings was maintained; and (7) the ALJ's decision was in writing with a statement of reasons. Clearly any "court", as the word is commonly understood, conducts its affairs in accordance with each of these elements.

The appellate courts themselves have begun using the terms "administrative law court" or "administrative court" in referring to proceedings held before the Office of Administrative Hearings. See, for example, the Second Appellate District case entitled Mullen v. Department of Real Estate, 204 Cal.App.3d 295, 297 (1988) where Justice Compton began his discussion of the facts of the case by noting that, "Following a hearing, an administrative law court rendered a proposed decision...". Additional references were made to the administrative court, as distinguished from the Superior Court "trial court".

Similarly, in an unpublished decision in the Second Appellate District entitled Ho v. California Board of Examiners in Veterinary Medicine (1990) B043471, the Appellate Court continuously referred to the findings of the "administrative court" as opposed to the findings of the Superior Court "trial court". Because this decision is unpublished, a copy is attached hereto for your reference.

The title "Administrative Law Court" is nothing more than an accurate description of what the Office of Administrative Hearings is. Similarly, the title of our executive officer should be changed from "Director" to Chief Administrative Law Judge. This title already exists in other state adjudicatory bodies, most notably the Public Employees Relations Board and the Department of Social Services.

Undoubtedly, the Commission will look to other states to see what names are applied to their respective administrative adjudicatory bodies. Most often, the name will be similar to that currently used by California. But that is because, as Professor Asimow noted in his reports to the Commission, when the Office of Administrative Hearings was created in 1946, California was a pioneer in administrative adjudication. Other states followed California's lead, including its choice of name for the independent adjudicator. Now, almost fifty years later when California is once again on the cutting edge of revitalizing the administrative process, there seems to be little reason to institutionalize a name which is clearly outdated.

Sincerely,

Robert F. Katz

Robert F. Katz
President

attachment

STATE OF CALIFORNIA - BUSINESS, TRANSPORTATION AND HOUSING AGENCY PETE WILSON, Governor

DEPARTMENT OF REAL ESTATE
2201 Broadway
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(916) 227-0789

July 29, 1993

NATHANIEL STERLING
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

This is in response to your recent request to be notified about agency statutes which may be affected by your proposed administrative adjudication project. The Department of Real Estate has three statutory provision which call for accelerated hearings: Business and Professions Code Sections 10086, 11018.3 and 11019. In addition, the provisions of law relating to the Real Estate Recovery Account (Business and Professions Code Sections 10470 through 10480) could be impacted by your project.

We hope this information will be of assistance to you and if you have any questions, please contact me at (916) 227-0789.

Sincerely,

Larry Alamao

LARRY A. ALAMAO
Attorney in Charge

LAA/lz

STATE OF CALIFORNIA PETE WILSON, Governor

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August 26, 1993

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Subject: Comments on Tentative Recommendation:
Administrative Adjudication by State Agencies

Dear Mr. Sterling:

We appreciate this renewed opportunity to comment upon the recommendation to create a uniform state administrative procedure act. Having followed the course of the Commission's deliberations and drafting efforts, the OSHA Appeals Board lauds this effort to seek improvement in state administrative processes. Clearly, the latest recommendation addressing such concerns as exclusivity of the record, ex parte communications, separation of functions, and command influence, is significantly superior to earlier drafts.

However, it is our feeling, and one which we have expressed on numerous occasions during the past three years, that the "model" APA is not necessarily an improvement over current regulations that are applicable to our hearings and review procedures. Indeed, OSHAB has recently completed a two-year effort to revise existing regulations culminating in the publication of our updated booklet "Appeal Information" which has been enclosed for your consideration. This guide is available to all parties that appear before us. While we view these regulation revisions as part of an evolutionary process, one in which OSHAB is continually seeking to streamline its procedures, so that the represented and nonrepresented alike may exercise their rights under the OSHA program, costs associated with these revisions cannot be understated.

We are a small agency, with one legal advisor and a statewide unit of eight ALJs. Our caseload has increased over 120% during the past twelve months, exceeding 3,000 appeals per year. We are simply not in a position to undergo another extensive regulation review merely because a more uniform administrative procedure act has been promulgated.

One example of this predicament should highlight our position: Following a great deal of internal discussion among legal staff, ALJs, and public input, the Board revised its regulations pertaining to prehearing and post submission amendments (Sections 371.2 and 386, Title 8, California Code of Regulations) which allow for amendments to correct clerical errors in pleadings, to conform to proof or statutory requirement, but only when timely filed, no prejudice has been shown, and all parties are given appropriate notice. These provisions have been adjusted to maintain the basic informality of our proceedings, yet assure efficiency in scheduling, and protect parties from late hour surprise. They reflect the nature of the issues litigated at our hearings, the extent to which parties may or may not be represented by counsel, as well as the diverse geographical locations covered by the program. While these changes may not be our last thoughts in this area, they would appear to be far superior to the Commission's tentative recommendation in Section 642.360, allowing a party to amend or supplement a pleading "[a]t any time before commencement of the hearing".

Under this provision, the Division, the enforcement arm of the OSHA program, could theoretically change the nature of the alleged violation one day before a hearing. The amendment would be akin to a prosecutor refiling a criminal complaint, and then alleging a different offense on the day before the trial has been set. An unprepared Employer under the OSHA program would arguably be entitled to a continuance to prepare its defense, and the case would have to be reset, at great cost to the state, since the ALJ, witnesses, and parties would, more likely than not, have had to travel significant distances to the hearing location.

While the tentative recommendation provides that agency modification would be permitted, this could only be accomplished by rulemaking, thus forcing OSHAB to return to OAL for review of the same regulation most recently approved. Apart from being a waste of resources, it is not clear whether OAL review would then require additional agency justification for any divergence from the "model code."

This example can be repeated in any number of areas, including discovery, prehearing conferences, decision making, declaratory relief, etc. The point is, agencies such as OSHAB which have been created expressly for adjudication, and are statutorily separated from their prosecutorial analogues, more likely than not have developed regulations better geared to the constituencies that appear before them, than the lowest common denominator obtainable from any uniform code.

We therefore respectfully urge that the tentative recommendation be limited to the APA-designated agencies presently listed in the Government Code, or that the Commission consider an alternative approach suggested in prior years, which would permit variations in procedural requirements, so long as fundamental due process concerns are assured.

Thank you again for this opportunity to share our views on the Commission's administrative adjudication project.

Yours very truly,

Elaine W. Donaldson

Elaine W. Donaldson,
Chairman California OSHA Appeals Board

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August 26, 1993

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
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Subject: Comments on Tentative Recommendation on Administrative Adjudication

Dear Mr. Sterling:

Attached for your consideration are comments on individual portions of the proposed new administrative adjudication procedures, which are made on behalf of the Department of Health Services.

As a matter of background to these comments, please allow me to give you a brief explanation of the experience which I am able to bring to the views expressed. I have been an attorney for the State of California for 19 years, 16 of them as a Deputy Attorney General and three as Chief Counsel to the Department of Health Services. I have personally handled and supervised dozens of administrative cases. Many of these cases (probably more than 50%) have been under the current California Administrative Procedure Act (APA). The remaining cases have been under special agency procedures, both state and federal, such as State Personnel Board, Unemployment Insurance Appeals Board, and U.S. Department of Health and Human Services grant appeal procedures.

In my current position, I supervise five (soon to be six) Administrative Law Judges who handle specialized cases, both under the APA and under program-specific statutes and regulations. (My supervision is procedural and administrative only. Since I do directly supervise the advocacy functions of my Department's legal staff, I sequester myself totally from the substance of the decision-making process.)

This background has given me both broad and deep insight into administrative adjudication procedures of various types, from the welfare "fair hearing" to the major license revocation proceeding involving a sophisticated corporate licensee represented by experienced trial counsel. In preparing these comments, I have relied both on my own background and on views expressed to me by our senior Administrative Law Judge.

In addition to the detailed comments attached, I would like to make a more general point. While I support and admire the efforts of the Law Revision Commission to unify California administrative adjudication procedure into a single system, the resulting product appears to me to have two serious shortcomings. First, the attempt to simplify all procedures by eliminating steps or distinctions which are not always applicable does not, in my opinion, always make the law more approachable for the non-expert. The opposite may well be true. In an area such as an appeal from a fiscal audit, for example, referring to the required pleadings as an "initial pleading" and "responsive pleading" would be singularly unhelpful, since it is the appellant, not the agency, which has the burden of defining the issues. Second, to have a multitude of statutes which apply unless the agency by regulation says otherwise seems to me to be potentially very confusing. For a non-expert, each such statute would have to be checked against any applicable regulatory scheme. Even if, as appears to be contemplated, all such regulations are published in a single volume of the California Code of Regulations, having so many provisions that are subject to variance by regulation (and to different variance by each affected program) would likely cause substantial confusion and uncertainty.

A further consideration is the potential expense of such a major change at a time when the state is particularly strapped financially. The contemplated changeover would have immense potential costs in the form of regulations development, notices to the public, staff training, and so forth, including as a not insignificant component the cost to agencies and the public of the inevitable errors the learning curve would cause.

You have asked that, as a part of our response, we identify those statutes under which we currently follow non-APA procedures which should be retained. Given the multitude of proceedings conducted by the Department of Health Services, this is a near-insurmountable task. We have attempted such a list, and it is appended after the comments on the proposed provisions. While we have attempted to insure its completeness, there may well be types of hearings which were missed because they are not viewed as adjudicative in nature. However, as the comments we are submitting point out, the proposed statutes may well affect such hearings along with those which are intended to be adjudicative.

Thank you for your consideration of our comments. Please feel free to contact this office for any additional assistance we might be able to provide.

Very truly yours,

Elisabeth C. Brandt
Deputy Director and
Chief Counsel

Attachments

COMMENTS TO PROPOSED SECTIONS

Section 613.220 Page 39

This proposed section would allow service by mail to be made by facsimile (fax) transmission or other electronic means, in the discretion of the sender. We suggest that the section also require, in the event a form of electronic service is chosen, that a "hard copy" of the matter served be mailed at the same time. The recipient should be entitled to have a copy that is of normal letter quality. Regular mail follow-up to faxes is a normal legal and business practice.

Section 613.230 Page 40

This proposed section would add five days to the time within which a notice is effective or within which an act must be done if service is done pursuant to any means described in proposed section 613.220. Since the addition of five days for service by mail assumes that mailing delays actual receipt, it appears to us to make little sense to give the same extension for fax notice. We suggest that service by fax or other means of immediate electronic transmittal be effective without the addition of five days to the period if the sender verifies by telephone that the transmission was received in legible and complete form.

Section 613.310 Page 40

There has been some confusion in administrative practice as to how corporations and other parties who are not natural persons may appear. Generally, administrative agency rules do not require (and may even discourage) appearance through counsel. However, the general rule in court is that a corporation may not appear in propria persona since there is no natural person who "is" the corporation. The proposed section leaves this problem unsolved and thus creates an area for potential disputes. The issue of who is competent to represent a corporation or other non-natural party should be addressed specifically.

Section 641.110 Page 43

Subsection (a) of this proposed section contains one of the most significant problems presented by the proposed legislation, the definition of when an APA adjudicatory hearing is required. For ease of reference, it provides:

> "An agency shall conduct a proceeding under this part as the process for formulating and issuing a decision for which a hearing or other adjudicative proceeding is required by the federal or state constitution or by statute."

This proposed provision is so incredibly overbroad and vague, the mischief its enactment would cause is difficult to overestimate. Taking the provision literally, for example, an APA adjudicative hearing would be required for every instance of rule making, because rule making involves a "hearing . . . required by statute." Similarly, and for the same reason, an APA adjudicative hearing would be required whenever a statute requires some other type of quasi-legislative, information-gathering or public-input hearing, since the proposed statute does not exempt such circumstances. An argument can (and will) be made that this provision automatically turns all such requirements into requirements for adjudicative hearings.

Of particular concern are the types of hearings required to be given by various agencies before a license is granted or amended. Usually, an APA adjudicative hearing is available in connection with the initial issuance of a license only where the application is denied, and only at the request of the affected applicant. However, there may be an opportunity for a public hearing at the request of any interested member of the public where granting a license or a license amendment will affect the public. Such a hearing is usually a "public input" type of hearing, since its purpose is to take public comment, not to adjudicate the rights of an individual. The proposed section would appear to remove this important distinction. The consequences of turning a "public input" hearing into an adjudicative hearing are extensive.

The reference to state and federal constitutional requirements presents even more serious concerns. Good public policy requires that constitutional requirements for hearings be implemented appropriately through statutes and regulations. While a constitutional right to a hearing may initially be identified in a judicial decision, that decision is normally not explicit enough to be implemented directly (nor is it generally available to the public as a guide). The proposed statute suggests that an agency would have the power, in implementing this provision, to find that a constitutional hearing requirement can be implemented directly, without the need for legislative consideration or delineation of the express procedures to be used.

Worse, this provision would automatically implement any constitutional hearing requirement as a full-blown APA hearing. For example, the case of Skelly v. State Personnel Board (1975) 15 Cal.3d 194, requires a "hearing" with minimal procedural components as a "pre-implementation" step in the employee disciplinary process. The employee then gets a full adjudicative hearing after implementation of the personnel action. The proposed statute would appear to turn the so-called "Skelly hearing" into a full-blown APA hearing because it is a constitutionally required hearing. Absent legislative change, the State Personnel Board hearing would then be a second full APA hearing.

We strongly recommend that this provision be rewritten so as to abandon the attempt to cast every conceivable type of hearing requirement into the APA adjudicative hearing mold automatically. At the very least, the provision should only "default" those hearings that are expressly required to be full adversarial adjudicative hearings into the APA requirements. However, it would be much preferable to have those hearings which are required to be APA hearings expressly identified. We recognize that this would undo one of the basic purposes of the proposed reforms. Our recommendation in this regard is based on a belief that this purpose cannot be implemented without causing considerable confusion and uncertainty, and should therefore be abandoned.

Section 641.120 Page 44

This proposed section greatly worsens the potential problems which could be caused by the preceding section, as discussed above. Because it gives one narrow exception to when an APA adjudicative hearing is required, it implies that there are no other exceptions. Again, the implication is left that henceforth, all hearings mentioned anywhere in any context (other than those which expressly refer to inapplicability of the APA or are not conducted by covered entities) must be adjudicative hearings conducted under the APA.

Section 641.340 Page 50

Although the proposed article beginning with this section applies only if adopted by regulation, its content is of concern, since this would presumably be the only procedure available short of enactment of a separate statutory scheme. This proposed section would specify how an "emergency decision" is to be issued. Presumably, this would be the provision under which this Department would issue what are now called "Temporary Suspension Orders" which suspend a license pending completion of a license revocation proceeding (see, e.g., Health and Safety Code section 1296).

The proposed provision which requires all emergency orders to be effective immediately would be very much unworkable for this agency, and we strongly recommend that an emergency order be permitted to have a delayed implementation date where this is necessary for the public health and welfare. For example, closure of a nursing facility may require deployment of extensive resources over several days or longer in order to avoid harm to the patients. It is not normally possible or desirable to serve the licensee with an order which terminates licensure immediately. (For example, termination of the license would mean immediate cessation of Medicaid funding. This in turn may mean all employees cease work immediately and no patient care staff remain. Also, since it is a misdemeanor for the licensee to continue to provide care after the license is suspended, the licensee can legitimately refuse to cooperate with transfer and "dump" the patients on state staff.) The agency should have the flexibility to delay the suspension of the license until after necessary pre-suspension steps have been

taken. Yet, unless the licensee is served with an executed suspension order, those steps will not be started. Thus, it is important that we be able to issue a suspension order with a delayed implementation date.

Section 641.350 Page 50

This proposed section is extremely vague and likely to be unworkable for this agency and many other licensing agencies.

The vagueness arises from the fact that it is unclear what the purpose of the adjudicative hearing is intended to be. The hearing, the proposed statute provides, is for the purpose of "resolv[ing] the underlying issues giving rise to the temporary, interim relief." This may make sense in the case of an emergency order unrelated to any other administrative action (e.g., under Health and Safety Code section 25846, an order to clean up an isolated case of radioactive materials contamination). In the case of a license revocation, however, where the license has been suspended pending a hearing on the grounds for revocation, does this mean that the hearing which must be started within 10 days of issuance of the emergency order is a hearing limited to the basis for the emergency order or all of the bases for license revocation?

An example will perhaps clarify the issue. Let us say a nursing facility's license should be revoked, in the view of the licensing agency, for the following reasons: several instances of inadequate record keeping concerning drug administration; several instances of operation without adequate staff; several instances of failure to follow dietary guidelines; patient trust fund violations of various kinds; several instances of fraud in the charges made to the Medicaid program; allowing a patient to choke to death because nursing staff failed to answer the call signal; and allowing three patients within the last week to develop severe bed sores due to lack of nursing care. In addition, the administrator has just resigned and no one is in charge of the facility.

In this example, the last three items might well constitute a basis for temporary license suspension. Under current California APA practice, the licensee would be served with an Accusation giving all the bases for revocation, and with a Temporary Suspension Order giving the last three items as the bases for the license suspension prior to hearing. The adjudicative hearing (which must commence within 30 days under Health and Safety Code section 1296) then adjudicates the entire Accusation, not just the bases of the temporary suspension.

Assuming that the proposed statute has the same intent, this should be clarified. In that event, the requirement that the adjudicative hearing commence within 10 days is very unrealistic. There are several reasons for this:

1. It is generally impossible to get an Administrative Law Judge and a hearing room with that little notice.

2. The agency would find it impossible to get a Deputy Attorney General assigned, educated to the case and freed for what could be a very time-consuming hearing in that short a time.

3. In a genuine health and safety emergency, the agency generally has to act very precipitously in putting together its initial papers supporting the suspension. Once the suspension is in effect, some time is needed to put an adequate case together on the full license revocation. The consequence of requiring a full license revocation hearing to start 10 days after service of the suspension would be that the suspension would be delayed (even where health and safety considerations argue to the contrary) until the agency had completed preparing its case on the full revocation action. The agency would have to balance the immediate threat to safety against the very real counter-threat that the revocation action would be unsuccessful because of lack of preparation.

It is possible that the phrase "commence an adjudicative proceeding" is not intended to mean that the hearing must begin, but only that the initial pleading must be issued. This reading is suggested by a comparison with proposed section 642.310. However, this is not clear (compare proposed sections 642.210 and 642.230; does the term "initiate" have a different meaning than "commence"?) If this is the intended meaning, it must be clarified, e.g., by specifying "commence an adjudicative proceeding by issuance of an initial pleading."

Section 641.370 Page 51

This proposed section gives the subject of the emergency order an appeal to the agency head, which must be heard and decided within 15 days of service of the petition for review. There are several serious problems with this provision:

1. How does this relate to the preceding requirement that the adjudicative hearing on the underlying issues start within 10 days? Is the agency head to be reviewing the initial emergency decision while the hearing on the underlying issues is going forward?

2. The procedure to be followed is to be the same as that used for review of a proposed Administrative Law Judge decision. However, since there is presumably no formal administrative record supporting the decision at this point (the hearing required by proposed section 641.350 would not have been completed in time), the

agency head cannot comply with the requirement that the record be reviewed.

3. The timing seems impossible. It is difficult even to get on the calendar of a busy director or board on 15 days' notice, much less have that person or body review what may be a complex record (assuming one can identify what it is) and consider oral or written argument.

Currently, the emergency orders with which I am familiar are subject only to judicial review (seeking injunctive or mandate relief). This is generally viewed as appropriate, since these types of orders are not issued lightly and generally would have been reviewed and approved at the executive level prior to issuance. Further internal agency review would not likely lead to a different result. We would urge you to remove this awkward and probably non-meaningful avenue of appeal from the general APA provisions. If it is of use in connection with some particular type of emergency order commonly issued at a relatively low level in an agency, it should be dealt with in a statute specific to that process.

Section 642.220 Page 54

This proposed provision would give every person a right to "make an application for an agency decision" and would provide that any such application "includes an application for the agency to initiate an appropriate adjudicative proceeding, whether or not the applicant expressly requests the proceeding."

With all due respect for the drafters of this provision, this is the kind of general language that has no real usefulness other than to create endless litigation.

What exactly does the right to apply for a decision encompass that is not expressed in some substantive statute? If nothing, then why say it? If there is a new right granted here, what is it? Does this give me the right to apply to any agency to make a decision on anything I care about? One would hope not, yet it is difficult to point to anything in the proposed language that says otherwise.

Moving to subdivision (b), what exactly is the consequence of the provision that deems every application for a decision to include an application for "an appropriate adjudicative proceeding"? Such a provision, in a complex administrative environment, raises more questions than it answers. For example, where there is a time constraint on the agency (e.g., it must schedule a hearing within 15 days of the request being made), does this time start running when the decision is requested rather than when the hearing is requested, since the former is deemed to include the latter? Does it require the agency to schedule a hearing even if the application is defective? If a particular request for a hearing is required to specify the issues on which a hearing is sought, is the agency

required to deem all issues to be included in the "automatic" hearing request? If it is not clear in law that any right to a hearing exists, must the agency still deem that one was asked for and respond as if it had been (e.g., by issuing an opinion on whether or not a hearing is required)?

These are just some of the problems and uncertainties raised by the proposed provision. It appears to us that far more certainty and understandability would be created through a law which requires that the agency, at the time it takes any action or receives any request which creates an entitlement to a hearing, give clear notice to the affected party or parties of how to request such a hearing and of the time period within which the request must be filed to be effective. We strongly urge that subparagraph (a) of the proposed provision be eliminated and that subparagraph (b) be changed to such a notice requirement.

Section 642.230 Page 55

Although the Comment concerning this proposed provision states that it "supersedes any implication [in the current APA] that a third party has a right to demand that an agency conduct a proceeding," this is by no means clear from the face of the proposed language. While there is a limitation that a hearing must be required for the provision to apply, this only limits the type of decision covered by the statute, and is silent as to the requisite interest in that decision the applicant must have.

This proposed statute is likely to generate extensive litigation because it expresses the right to a hearing not exclusively (i.e., by specifying when it applies) but inclusively (i.e., by granting that right in all cases which the limited exceptions stated do not cover). There will inevitably be circumstances where the statute arguably gives a right to a hearing, but it clearly shouldn't have. Those cases will lead to litigation and to rule making by court decision. Such a result should be avoided. The law should state clearly when a hearing is required, not state that a hearing is always required unless it is prohibited.

Section 642.240 Page 56

Although this is by no means clear, this provision appears to apply when an individual or entity applies for a license. It contains points of substantial uncertainty in such a context.

Is it the intent of this provision, as it appears to be, that all applications must be granted, denied, or brought to hearing within 90 days? If so, does it deprive the agency of jurisdiction to continue to work with a license applicant to complete its application once the 90 days is up? (Forcing the applicant to file a new application upon denial may have significant adverse consequences, such as the requirement that another fee be paid or failure to come under a "grandfather" exemption.) Does this

statute give the agency unlimited discretion to decide when to hold an adjudicative hearing prior to license granting or denial? (This appears to be its plain meaning.) Is the "brief statement of the agency's reasons" that must be served with a denial in addition to the subsequent "initial pleading" explaining the reasons for denial? If so, is it preclusive (i.e., does it preclude the agency from raising bases for denial in its initial pleading that were not mentioned in the notice of denial)?

This provision is quite foreign to current California administrative procedure, where there is no uniform procedure related to either the granting of a license or the process leading up to denial of a license. Both processes are custom-tailored by specific provisions if necessary (e.g., where a public hearing prior to the granting of a license application is provided for). The uniform APA process starts only once a license application is denied, the applicant has appealed the denial, and a hearing has been requested. We have seen no evidence that this format does not fully meet the needs of license applicants.

Section 642.320 Page 57

The requirements of this provision are unclear. Subparagraph (a)(1) requires the agency to specify the "issues to be determined, including any acts or omissions with which the respondent is charged" and any matters that "would justify a decision against the respondent." Subparagraph (a)(2) requires that the agency specify the "statutes and regulations that are at issue," including any which the respondent is alleged to have violated or with which the respondent must show compliance, but these "specifications shall not consist merely of issues or charges phrased in the language of the statutes and regulations."

But for the last provision, one would assume that subparagraph (a)(1) requires the agency to lay out the facts and subparagraph (a)(2) requires it to lay out the applicable law. (One would have expected the statute to require the agency to say which facts show violations of or failure to comply with which law.) However, what exactly does it mean that the statement of applicable laws may not just use the language of the laws?

This provision would be much clearer if it required (1) a specification of each statute or regulation that the respondent is alleged to have violated, with which it has failed to show compliance or an ability to comply, or which is otherwise a basis for the agency action at issue; (2) a statement of the facts which support the agency action at issue; and (3) an organization of the pleading or allegations sufficient to allow the respondent to determine which facts relate to which legal requirement.

Section 643.330 Page 67

This and other provisions use the term "nonprosecutorial in character." This term should be defined. While it may be clear to some people and in some contexts, it is by no means transparent. While a license revocation proceeding is fairly clearly "prosecutorial," is a proceeding to grant a license over objection from public advocates "nonprosecutorial"? What about a ratesetting proceeding? What about a proceeding to determine whether a non-punitive transfer of a state employee was lawful?

We also have the following suggestion concerning subsection (a)(5). This proposed subsection allows advice on a technical issue to be given to the presiding officer by certain persons in nonprosecutorial proceedings "provided the content of the advice is disclosed on the record and all parties have an opportunity to comment on the advice." Since a violation of this provision would have very serious consequences (possibly a total reversal and need to redo the entire proceeding), it should be much clearer. What does it mean to disclose the "content" of the advice? All of it? A summary? When does this have to be done? How are the parties notified? How long do they have to comment? Is an opportunity to comment orally on the record adequate?

Section 645.210 Page 72

Proposed subsection (a) sets the timing of discovery. It would be useful to specify when discovery is to be provided in connection with an appeal from an emergency decision, if the current requirement that the hearing go forward less than 30 days after service of the emergency order is retained.

Proposed subsection (b) would add a "continuing duty" on each party to provide the other party with supplemental items meeting the discovery request, "immediately on obtaining knowledge, possession, custody, or control of the matter."

So-called "continuing discovery" is uniformly disfavored and generally prohibited in civil matters (see for example Code of Civil Procedure section 2030(c)(7), which expressly provides that "[a]n interrogatory may not be made a continuing one so as to impose on the party responding to it a duty to supplement . . . "). Continuing discovery is a trap for even meticulous busy practitioners, since it requires constant inquiry about matters that may or may not exist; it is particularly difficult for the attorney for a large public agency, such as the Department of Health Services, where several components of the agency may take actions relating to a respondent, or may receive arguably relevant materials from others, without even having any awareness that a proceeding is ongoing, much less that a discovery request is pending.

We strongly urge you to delete this requirement. If it is considered important to allow a request to update discovery to be filed, this should be a one-time opportunity, perhaps at the time of a pre-hearing conference.

Article 3. Compelling discovery Page 73

This subpart does not specify whether judicial review of discovery rulings by the Administrative Law Judge is available or, if it is, what standard of review applies. It should so specify.

Section 645.440 Page 76

This provision should contain a cross-reference to Government Code sections 68097.1 and 68097.2 which, read together, require the payment to the state of the total cost of the compensation and traveling expenses of subpenaed state employees as a condition of validity of the subpena. A deposit of $150 has to be tendered with the subpena. Most public agencies have interpreted this provision to apply in administrative hearings. Indeed, it is difficult to read it otherwise. Some agencies apparently do not apply the requirement (although it appears to allow for no exceptions) in circumstances (such as personnel hearings) where state employees are necessary exculpatory witnesses. Perhaps this provision could seek to codify such exceptions for administrative hearings. We do not recommend a general exemption from the requirement, since the subpenaing of large numbers of state employees, especially upper level management, has been used as a technique for harassment of public agencies in the administrative adjudication context.

Section 646.210 Page 78

The term "occupational license" should be defined. Generally, it is used only to refer to individually held licenses to practice an occupation, with no ties to specific premises (e.g., a license to practice medicine). But even that definition is not clear or universal. Does it cover teachers? Health facilities administrators? Certified nurse assistants? Radiation technologists? Laboratory technologists? Realtors? Or is it limited to licensees under the jurisdiction of the Department of Consumer Affairs?

Section 647.210 Page 81

This proposed section is unclear. Does (a) mean that the article only applies to agency procedures which by statute require arbitration or mediation, or that its provisions are mandatory instead of permissive if a statute so requires? This should be clarified. As to subsection (b), does this mean that an agency which is required to have mediation or arbitration procedures can set up conflicting procedures by regulation, or only that an agency which is not required to offer mediation can, by regulation, avoid

the proposed APA procedures which allow it? This should also be clarified.

Section 648.150 Page 84

Please see discussion of proposed section 648.350. The suggestions made could also be accommodated in this proposed section.

Section 648.310 Page 89

Please see the discussion of proposed section 646.210 for the need to define "occupational license." In those instances where the "clear and convincing" standard applies as a matter of constitutional law, the agency would not be able to provide for a different standard by regulation, as proposed.

Section 648.320 Page 90

Subsection (b) allows a party to be called as an adverse witness at any time. Most Administrative Law Judges disfavor calling the respondent as an adverse witness during the agency's case-in-chief, in cases where the agency proceeds first. The concept is that the respondent should be allowed to tell a cohesive story on direct examination in the first instance, before being subjected to cross-examination. Some thought should be given to codifying this practice, which certainly gives an impression of "fair play." We suggest that the following language be added at the end of the existing text:

> "However, where the agency presents its case before the respondent's case, an individual respondent or the chief representative of an organizational respondent may elect, upon being called as a witness, to delay cross-examination until after the respondent or representative of the respondent has testified on direct examination as a part of the respondent's case. In the event of such an election, the agency may rest its case in chief subject to the testimony of the respondent or representative of the respondent being considered as additional evidence for the agency, and subject to a right to call the respondent or representative of the respondent on rebuttal if he or she does not voluntarily take the stand during the respondent's case."

Section 648.350 Page 91

This proposed section allows the presiding officer to protect child witnesses. It should be expanded to allow the presiding officer to protect other vulnerable witnesses, such as developmentally disabled or medically fragile adults, as well. A procedure I have used very successfully, which could be described either in this section or in proposed section 648.150 or 648.140, is the following:

Where a witness is extremely fearful, embarrassed or afraid of testifying in front of the respondent and/or the public, the public and the parties, if a party is the source of the fear, can be put in a separate room from the Administrative Law Judge, the witness, and counsel. A video camera is set up to broadcast the witness' testimony live to the room in which the public is watching. If the parties are excluded, an opportunity for counsel to confer with their clients as necessary would be made available. This procedure would be used only during the testimony of the witness who needs protection, not during the entire hearing.

Such a procedure is very beneficial in a situation such as a personnel action in a state facility (I have used it in connection with the discharge of a developmental center employee for raping a mentally disabled resident) or a license revocation involving a facility for young, disabled, and/or medically fragile residents. In such a situation, the right of the residents to be free from abuse is as deserving of protection as the right of the respondent to personal "confrontation" of the witness, and the criminal law cases on confrontation would not be appropriate models.

It would be helpful to have any such procedure spelled out in the statute so that the question of its appropriateness would not have to be argued de novo in each of the infrequent cases where it is necessary.

Section 648.450 Page 93

I would suggest that the term "administrative hearsay" be used instead of the term "residuum rule." In 19 years of practice before state and federal administrative agencies, I have never heard of a "residuum rule," and a survey of my staff found only one person who had heard of the term. The concept that hearsay can be used to supplement or explain direct evidence, but not to support a finding by itself, is commonly referred to as "administrative hearsay" instead.

Section 648.460 Page 93

This provision should be reexamined in light of the recent United States Supreme Court decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993) ___ U.S. ___, 113 S. Ct. 2786. While the case interprets federal law, it reverses the specific federal case on which California law on this issue has been based.

Section 648.510 Page 94

Please see comment to proposed section 643.330.

Section 648.520 Page 94

This proposed provision prohibits ex-parte communications. However, it is overbroad in its literal meaning. In the case of

Administrative Law Judges employed by a large agency, there may be a number of matters totally unrelated to the proceeding at issue concerning which an Administrative Law Judge and agency employees need to communicate. For example, I may be discussing with an Administrative Law Judge whether or not a proposed new regulation would present a problem in future cases, or ask the Administrative Law Judge to write a justification for new positions in the hearing office. Such conversations, while unobjectionable because they are unrelated to any pending adjudications, would arguably be prohibited by the proposed statute.

A suggested modification which would solve this problem is to amend the first sentence as follows:

> "(a) Except as provided in subdivision (b), while the proceeding is pending there shall be no communication, direct or indirect, on any matter concerning or affecting the proceeding, between the following persons. . . "

Please also see comment to proposed section 643.330 concerning use of the term "nonprosecutorial."

Section 649.140 Page 100

This proposed section specifies the actions an agency head may take on a proposed decision without reviewing the entire record. The Department of Health Services has used an additional method, which seems to have been of benefit to all concerned. When a proposed decision, in the opinion of the Director, contains erroneous reasoning or a misstatement of the law, or when the Director considers the decision wrong, but does not consider the monetary amount at issue worth further proceedings, the Director will adopt the decision, but state in the statement adopting the decision that he or she does not agree with all or some specified part of the reasoning.

We believe it is very much in the public interest to have an agency adopt routine proposed decisions which either reach the correct result for the wrong reason or which, though they reach a wrong result, should not be alternated or remanded because the cost of the effort would be excessive given the small monetary amount involved or the relative insignificance of the matter at issue. However, it is important in such cases to avoid the implied "adoption" of the erroneous reasoning by the Director. One reason for this is simply to avoid it becoming an issue in future litigation. No matter how much of an effort one makes to designate decisions as non-precedent-setting, they do get cited against the agency in spite of that effort. More important, however, from the public interest standpoint, is the desire to have the decision maker appear consistent. Adopting erroneous reasoning in one decision and rejecting it in another is confusing to the public unless the reason for this is explained.

We believe it would be helpful to codify this practice, and suggest the following additional subsection under subpart (a):

> "Adopt the proposed decision in its entirety as a final decision, with an explanation which expresses disagreement with all or part of the decision. The expression of disagreement is for the guidance of the parties and the public in future disputes and does not affect the validity of the decision itself."

Logically, such a provision should probably be inserted as subsection (2), with the remaining subsections to be renumbered appropriately.

Section 649.210 Page 103

This section seems very difficult to understand. If it applied only to proposed decisions, it would make sense, but when exactly is it appropriate for an agency head to review "final" decisions? Does this include decisions which have become final by the passage of time, or by adoption? This would seem to allow an agency to reopen its own final decisions or to allow a party to petition for endless cycles of re-review. This appears to be an attempt to cover some type of unusual procedure (where a "final" decision issued by a lower body or Administrative Law Judge is subject to discretionary review), but without more specificity as to when it does not apply, the language appears to us to cloud normal procedure considerably.

Section 649.230 Page 104

The requirement that "[a] copy of the record shall be made available to the parties" is ambiguous. It could be interpreted to require an affirmative tender of the record in all cases. Because of the cost of a copy of a record, most respondents or their counsel do not wish to purchase it at that time in the cases with which we have had experience. We suggest that this language be changed to read: "The parties shall be notified, at the time that the reviewing authority makes the determination to decide the case on the record, that a copy of the record will be available, when it will be available, and the schedule of charges, if any, which the agency imposes for copies of the record."

Section 649.240 Page 105

This proposed subsection deals with decisions made after review of the record by the reviewing authority.

Subsection (a)(3) provides that one of the options for the reviewing authority is to:

"(3) Reject the proposed or final decision, without remand. The reviewing authority shall dispose of the proceeding within a reasonable time after rejection."

This provision is extremely vague, and appears thoroughly confusing. Allowing an agency to reject a decision without substituting anything for it is very strange in the normal adjudicative context. Perhaps it has some function in what the document calls "nonprosecutorial" proceedings, but its inclusion as a general rule seems to us highly inappropriate and likely to lead to confusion and improper procedural calls by agencies.

Also please see the preceding comment on the subject of rejection of "final" decisions.

NON-APA PROCEEDINGS IN WHICH THE DEPARTMENT OF HEALTH SERVICES HAS INVOLVEMENT

The following is a list of discrete hearing procedures utilized by the Department of Health Services. It may not be complete because of the diversity of such proceedings. Many of these proceedings have their own procedures for very good reason, such as ease of administration, need for speed, or lack of truly adversary nature.

1. Hearings under the Government Code

Section 11180-11181: Investigational hearings. These hearings, conducted infrequently, need to be tailored to the circumstances, and should not be forced into any particular format.

Section 19175: Rejections on Probation. These hearings are very limited, given the strong discretion of the agency in this area. They should not be made more formal.

Section 19233: Denial of Reasonable Accommodation. Pursuant to this section and 2 C.C.R. 547.32, informal hearings are held to review appeals from a denial of a reasonable accommodation request.

Section 19575: Notice of Adverse Action. Standard personnel matters are heard pursuant to this section and related regulations.

Section 19996.1: Setting Aside Resignation. This is another proceeding which is highly specialized and involves considerable discretion.

There are also informal hearing rights pursuant to Skelly v. SPB (1975) 15 Cal.3d 194 and Coleman v. DPA (1991) 52 Cal.3d 1102, which are granted in addition to formal hearing rights and should not be forced into a format which duplicates the formal hearing track.

2. Hearings Under the Public Contract Code

Section 10345: Bid Protests. This statute requires the agency to have written procedures, which may be specific to a particular bid process. This is appropriate given the vast variety of different processes covered.

3. Hearings under the Health and Safety Code

Section 255: California Children Services Program Disputes. These are "fair hearing" type procedures with special considerations. They should not be merged with other procedures.

Sections 311, 312: Beneficiary Appeals under the Women, Infants and Children Program (See also 22 C.C.R. §40703). These informal "fair hearings" are conducted by non-attorney hearing officials.

Section 319: Other Appeals under the Women, Infants and Children Program. This statute incorporates by reference the federal regulations applicable to such appeals and makes them applicable as a matter of state law. Note also 22 C.C.R. §40751 (food vendor appeals) and §40781 (local agency appeals).

Section 530: Environmental Health Specialist Registration. This statute provides for an investigation, an informal hearing, and a subsequent APA hearing. The informal level should not be elevated to a second APA proceeding.

Section 1428: Long Term Care Facility Citation Appeals. Care should be taken not to displace this procedure, which is carefully balanced to comply with federal law and with constitutional requirements related to civil money penalties. While the procedure provides for an APA hearing in some circumstances, it also involves several other types of review, including preliminary review at a Citation Review Conference, which is not and should not be an APA hearing.

Section 1704: Cancer Advisory Council Investigations. Subsection (e) of this provision authorizes the holding of hearings. They are investigational in nature and should not be forced into an adjudicative format.

Section 4027: Maximum Contaminant Level Exemption (Drinking Water). This statute requires a public hearing for the purpose of informing the public and allowing for public input. It should not be formalized.

Section 4027.6: Variances from Public Water Standards. Information gathering hearings under this statute are intended to determine community opposition and health risk. They should remain informal.

Section 25845: Radioactive Materials Licenses. This statute contains three different procedures, an information gathering type of hearing at which "any person whose interest may be affected" must be heard (for granting or amending a license), an APA hearing (for denying, suspending, or revoking a license), and a rulemaking hearing (for actions on regulations). These three types of hearings are appropriate to the different actions to be taken and should be preserved.

Section 25893: Tableware Civil Penalty Appeals. These special proceedings are to be conducted before a specially appointed hearing officer, and require time frames which the Office of Administrative Hearings may not be able to meet. They use APA procedures only until the Department of Health Services has promulgated specific regulatory procedures.

Section 26671: Whether a New Drug or Device Application is Approvable. This section contains a discrete procedure for

reevaluating a denial of an application for approval of a new drug or device. Since this is a quasi-investigative function, it should be retained in its current form.

Section 26672: Order Refusing to Approve New Drug or Device. While this hearing could conceivably be handled under the APA, it is still essentially a scientific investigatory function.

Section 26675: Withdrawal of New Drug or Device Approval. Similar to preceding sections.

Section 26691: Sherman Law Civil Penalty Appeals. See comment to section 25893, which is similar.

Section 28502: Closure of Waters to the Taking of Shellfish. This is an emergency procedure which is primarily of interest to members of the public, not to a particular individual. It requires public notice and the taking of public input in an appropriate manner. Since this is a public health matter on which the public has little expertise, the procedure should not be made more formal.

Section 28518.8: Violation of Shellfish Law. Since this procedure covers a variety of possible violations, affecting different kinds of individuals, entities or groups, the procedure should remain the very flexible one currently in the statute.

Section 28550: Civil Penalty Appeals - Various Entities. See comment to section 25893, which is similar.

Section 38060: Formal Direct Services Contract Appeals (See also 22 C.C.R. §20201 and §20204 for informal appeals). The statute specifically calls for flexible procedures to be used, to accommodate the particular needs of a given case.

4. Hearings under the Welfare and Institutions Code

Sections 10950-10967: Beneficiary "Fair Hearings". This is the basic welfare "fair hearing" process which is used by Medi-Cal. This procedure complies with constitutional requirements and program needs. It should not be changed just for the sake of achieving a single model.

Section 14087.27: Selective Provider Contract Disputes (See also 22 C.C.R. §66344). By contract, inpatient hospital rate contracts can provide for an administrative dispute resolution procedure. Obviously, this requires flexibility since it is a negotiated dispute resolution process.

Section 14105.38: Hearing on Deletion of Drug from List of Contract Drugs. This is a special hearing procedure which gathers information for a science-based decision. It should not be merged with standard adjudicative procedures.

Section 14105.98(s): Disproportionate Share Adjustment Appeals. This is a flexible provision applicable to any appealable issues which may arise. It should not be formalized.

Section 14123: Suspension of Medi-Cal Provider (See also W&IC §14124.5 and 22 C.C.R. § 51048.1 et seq. Federal rules at 42 C.F.R. § 431.153 et seq). While the hearing on the merits is an APA hearing, related procedures such as automatic suspension and temporary suspension must be retained to ensure conformity to federal law.

Section 14123.2: Medi-Cal Provider Penalties (See also 22 C.C.R. §51485.1). This is another civil penalty provision which should be retained because of its inherent dissimilarity to typical APA-covered adjudications.

Section 14126.50: Appeals from Long Term Care Facility Rate Setting Audits (no specific regulation, but procedure under 22 C.C.R. §51016 et seq. is appropriately used). See discussion of section 14171. The same comment applies to inpatient hospital rate appeals which occur pursuant to Welfare and Institutions Code sections 14105 and 14106, although those sections do not specifically refer to a hearing requirement, and to Mental Health (Short-Doyle) Fiscal Audit Appeals pursuant to Welfare and Institutions Code section 5712.4.

Section 14171: Medi-Cal Audit and Rate Appeals (See also 22 C.C.R. §§ 51016, 51536 and 51539). This procedure is well established and understood by the provider community. The APA is singularly inappropriate for these types of hearings because both the issues and the procedures are unique to the financial audit and ratesetting environment.

Section 14300: Intent to Contract with Prepaid Health Plan (PHP). This section provides for a public hearing, at the request of any person affected by the contract, when the Department of Health Services intends to enter into a PHP contract (new or renewal). The Director must find that the hearing request is reasonable and a public hearing is warranted. This is more in the nature of an information-gathering hearing than an adjudicative hearing.

Section 14450: PHP Contract Non-Renewal. Although this statute does not require a hearing upon non-renewal, since failure to renew must be for cause, the Department does provide a hearing upon request, using suitable procedures. PHP beneficiary fair hearings under subsection (a)(1) use the existing welfare fair hearing procedure.

5. Hearings Conducted Under Regulations

22 C.C.R. section 40245: Beneficiary grievance appeal to Director for Rural Health program.

6. Hearings Conducted By Agreement With Appealing Party

The Department of Health Services periodically provides hearing rights which are neither required by statute nor established through practice. Usually, the hearing procedures in 22 C.C.R. §51016 et seq. are utilized. It could be an unfortunate effect of the proposed new APA to have such hearings either cease to happen or be forced into an APA proceeding conducted by the Office of Administrative Hearings (since no statute provides an exemption). We would strongly urge specific statutory recognition of an agency's right to provide its own chosen hearing procedure in situations where a hearing is not clearly required, but may be in the public interest.

State of California - Health and Welfare Agency

File:
Key:

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
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August 27, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Members of the California Law Revision Commission:

This is the California Unemployment Insurance Appeals Board (CUIAB or Appeals Board) comments with regard to the Law Revision Commission's tentative recommendation concerning administrative adjudication by State agencies. Because these comments focus on how the tentative recommendation would affect CUIAB operations, it is necessary to explain how the CUIAB currently operates.

The CUIAB is separate from the Employment Development Department. It adjudicates determinations made by the Employment Development Department regarding unemployment insurance, disability insurance and related tax matters. The issue of separation of function, a significant element in the tentative recommendation, has no application to the Appeals Board as EDD and the Appeals Board are functionally separate.

State unemployment insurance systems must be in conformity with federal laws and rules. States that fail to conform to federal law and rules are subject to severe penalties. Federal law, rules and court decisions set forth standards to assure that all administrative appeals affecting benefit rights are heard and decided with the greatest promptness that is administratively feasible. Failure to meet these standards can result in the Department of Labor stopping payment from the unemployment fund to the state (California paid out approximately 2 billion dollars in benefits last year) and can result in doubling the payroll tax paid by employers. Currently, the Board meets federal standards. The Board is concerned that the tentative recommendations, with its emphasis on an elaborate adjudicative process, would interfere with the CUIAB's ability to meet federal standards.

The CUIAB has approximately 180 administrative law judges, who last year, issued approximately 230,000 first level decisions. Additionally, the Board issued approximately 20,000 appellate or second level decisions. Hearings are informal and typically parties represent themselves, although in some cases they are represented by others. Only in rare

cases are parties represented by attorneys. The process begins with a determination issued by the Employment Development Department either granting or denying benefits. That determination may be appealed to the CUIAB. Although EDD is always a party to any such appeal, EDD only infrequently appears at the hearing. When it does appear it typically explains its reasons for deciding the way it did. It is the responsibility of the administrative law judge to draw out the facts from all parties present at the hearing. There is usual very little cross examination although parties often follow-up questions asked by the administrative law judge. While parties have the right to be represented and the right to cross examination the hearings are more in the nature of fact finding. There is no "accusation" and there is no prosecutorial flavor to the proceeding unlike the tentative recommendation.

The Unemployment Insurance Appeals Board and the unemployment insurance system were established as part of the Social Security Act in 1936. Thus, it predates the APA. It is the CUIAB's contention that the exclusion of the CUIAB from the APA was a considered decision on the part of the legislature and is as valid today as it was then. This is so because the nature of the hearing is different than that set out in the APA.

Although the CUIAB does not have precise statistics, an informal survey of other agencies leads us to believe that the CUIAB holds more than 60 percent of all State administrative hearings. The model set forth in the tentative recommendation is more suitable for a license revocation hearing than the hearing done by this agency. The APA model is not suitable for this agency. In fact, given the great number of cases done by this agency, it serves no real purpose to force the Board to adopt the APA.

It is helpful to be able to opt out of certain provisions of the proposed tentative recommendations. This is a partial but not complete solution. To opt out, the Appeals Board must promulgate regulations. In addition, the tentative recommendations will require new regulations. The CUIAB already has duly promulgated regulations governing its procedures. Because this agency's processes are so antipathetic to the model embodied in the tentative recommendations, in our view, this agency would be forced to opt out of all possible provisions and go through the process of re-instituting regulations.

Promulgating regulations poses difficulties to this and other agencies. Aside from the time and expense, the Office of Administrative Law will likely question any deviation from the model rules that the Office of Administrative Hearings is required to offer pursuant to this proposed legislation. This, in conjunction with whatever comments may be elicited from members of the public, will result in OAL evaluating the proposed regulations to determine whether the proffered regulations meet the "necessity" criteria. In effect, OAL,

which has no operational responsibility for the CUIAB, will be deciding issues that affect the Board's ability to operate.

In this vein, the proposed addition of Government Code section 11340.4 (page 110 of the tentative recommendation) significantly enhances the Office of Administrative Law's powers. OAL staff will be able to examine an agency's procedures and forms (which OAL regards as regulations) for the purpose of exposing "underground rules" which would then need to be adopted as regulations. The result will be a tremendous expansion of regulations in spite of the fact that one of the stated purposes of the Office of Administrative Law is to reduce the number of administrative regulations. (See Government Code section 11340.1.)

The model set forth in the tentative recommendation guarantees that this agency and others will opt out of all permissible provisions. Thus, this Board will have to re-promulgate its existing rules and adopt new rules "interpreting" various provisions of the tentative recommendations. If the reason for the tentative recommendation is convenience to the public, the Board's rules can easily be put together with similar procedural rules of other agencies in one place so that the public can easily find them.

Aside from the above, the Board has the following specific objections. These specific objections are not meant to be comprehensive. Tentative section 610.350, initial pleading, does not adequately describe the determinations made by EDD which are neither an accusation nor an institution of an investigation. Section 610.672 has no application to this agency because the CUIAB will set a hearing upon an appeal even if the appeal is not very specific. This section seems to require a greater degree of specificity than currently required by the Board and could be the kind of technicality that would put the Board out of conformity with federal rules.

Provisions concerning notice beginning with section 613.210 also raise potential problems in terms of compliance with federal standards. The difficulty is that this agency is required to hear and decide at least 60 percent of all first level benefit appeal decisions within 30 calendar days of the date of appeal and at least 80 percent of all first level benefit appeal decisions within 45 calendar days (20 CFR section 650.4). Appeals may be to the CUIAB field office or the EDD office. Most appeals are mailed or delivered to the EDD and it usually takes at least a few days for EDD to transmit the appeal to the CUIAB local office of appeals. That CUIAB office then mails a Notice of Hearing which requires the presence of parties. Under proposed section 613.230 the ten days Notice of Hearing would be extended by five days. Thus, the soonest a hearing could be held is about 17 or 18 calendar days after the appeal, leaving only 13 or 14 calendar days to hear the case and issue a decision.

Chapter 4, beginning with section 614.110 has no application to this agency. However, it is unclear whether the Board must follow these provisions, promulgate regulations saying they are not applicable, or simply ignore them.

With respect to Part 4, adjudicatory proceedings, Article 2, declaratory decisions, and Article 3, emergency decisions, it is difficult to see how these would apply to this agency. Again, there is some unclarity as to whether a provision that appears to have no application is nevertheless required to be implemented, whether regulations must be adopted indicating that such provision has no application, or whether the provision can be ignored because it is never applied.

As it now stands, the tentative recommendation does not permit agencies to opt out of Part 4, Chapter 9 which deals with issuance of decision, administrative review of decision and precedent decisions. The decision model set forth in this chapter differs drastically from the procedure employed by the CUIAB. The chapter assumes a proposed decision is issued by an administrative law judge from the Office of Administrative Hearings. That decision is then referred to the initiating agency for adoption or modification. That agency is required under section 649.110 to issue an final decision within 30 days.

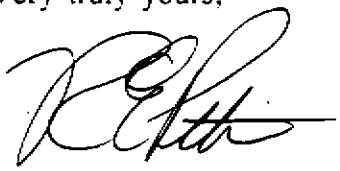
Appeals from the EDD decisions are set for hearing by the CUIAB. The decision of the administrative law judge is final unless it is appealed within 20 days. If it is appealed, the Appeals Board, acting as an appellate body, reviews the decision and a panel of Board Members affirms, reverses, remands or modifies the decision. By operation of Unemployment Insurance Code section 410, the Board's decision is final and the Board loses jurisdiction. Therefore, section 649.110 would appear to have no application to the Appeals Board and inclusion of this provision as part of the Board's operating procedure would simply create confusion. The same point can be made with respect to sections 649.130 and 649.140.

In section 649.150 the tentative language refers to Article 8 but we believe this is a typographical error and should refer instead to Article 2. Pursuant to 649.150(b), which in turns refers to 649.210, an agency such as ours arguably could articulate the procedure that we now use by regulation. This however is not clear. In any case, the provisions of Article 1 and Article 2 of Chapter 9 may not be able to be made to conform with the CUIAB's existing procedure or could be made to conform with existing procedure only with great difficulty and confusion. As always, the more difficult the process, the more likely the Board will be unable to meet federal standards.

Other problems raised by Chapter 9 deal with regulations that would probably have to be implemented in order to make clear the procedures which would implement the proposed statute. For example, 649.230(b) provides "the reviewing authority shall allow each party an opportunity to present a written brief or an oral argument as determined by the reviewing authority." As this provision is written, a regulation is required setting standards for granting oral argument or written brief requests. In addition, OAL regards "forms" as regulations and presumably all forms used by the Appeals Board would have to be submitted for OAL review. The tentative recommendation would thus spawn numerous new regulations. While putting everything in regulation may be a good idea, a balance needs to be struck between voluminous and complicated regulations required and any real improvement in the adjudication process.

The CUIAB hears more cases than other State agency in any given year. It hears more than 60 percent of all cases heard by State agencies. The model replicated in the tentative recommendations is not appropriate to this agency. Perhaps, the correct model the Commission should adopt is the CUIAB model. Other agencies that more closely conform to the existing APA can opt out of that model. In the CUIAB's view, the tentative recommendations will conflict or make it more difficult for the CUIAB to conform to federal mandates, cause the Board to spend time, energy and resources seeking to mold its processes to a hostile model and in general to create a more cumbersome and technical adjudication system. These negatives do not seem to be balanced by a corresponding positive. The laws governing the Board and the EDD are readily available in the Unemployment Insurance Code, the rules for both agencies are readily available. Many thousands of "customers" are satisfied with the process. If it is desirable to have all rules regarding adjudications in one place such a goal can be accomplished without the wholesale revision proposed by the tentative recommendations. Finally, and perhaps an unintended result of the tentative recommendations, is the broad expansion of the powers of the Office of Administrative Law and its conversion into an investigative agency. It is for all of these reasons that the CUIAB sees little value to subjecting itself to any of the tentative recommendations and it would seek to be exempted from them.

Very truly yours,



R. E. PETERSEN , Chief Counsel

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STATE OF CALIFORNIA

PETE WILSON, Governor

STATE BOARD OF CONTROL
P.O. BOX 48
SACRAMENTO, CA 95812-0048

August 30, 1993

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Administrative Adjudication by State Agencies
Tentative Recommendation

Dear Mr. Sterling:

The functions of the State Board of Control are largely adjudicatory. Thus, the Tentative Recommendation of the California Law Revision Commission on Administrative Adjudication by State Agencies is of significant importance to the Board. We are concerned that adoption of the Tentative Recommendation would be very costly to the Board, and would interfere with the efficient conduct of its work. We have endeavored to review each draft of the study upon its release. The Tentative Recommendation, however, differs from earlier drafts we have reviewed in certain significant respects which increase the likelihood of its having a substantial, adverse and costly impact on the State Board of Control. These comments are offered in response to the possibility of that negative impact.

The State Board of Control is charged with a myriad of responsibilities within state government for resolving claims filed against the state. Among these are some that require the Board to conduct an adjudicative hearing. These include claims for compensation from victims of crime (Government Code §§13959 et seq.); claims of persons injured while benefiting the public (Government Code §§13970 et seq.); claims against the hazardous substance account (Health and Safety Code §§25370 et seq.); claims of persons erroneously convicted of felonies (Penal Code §§4900 et seq.); and the resolution of protests of certain procurement decisions (Public Contract Code §§10306 and 12102(f)). The State Board of Control is not an agency listed in Government Code §11501 and, but for the requirement in Health and Safety Code §25375.5 that those claims are subject to the requirements of Government Code §11513, the hearings of the Board are not subject to the requirements of the Administrative Procedures Act.

The different adjudicatory decisions made by the State Board of Control each require a slightly different degree of formality. The Board's largest workload is in the Victims of Crime Program. Eligible applicants are victims of crime with no source of reimbursement for the losses they suffer as a result of the crime. The Board schedules as many as 120 cases to hear on each of two days each month. Approximately one-half of these are either resolved prior to hearing or the applicant fails to appear for the hearing. The Board presently hears the cases itself although in the past it has successfully used a non-attorney hearing officer. Very few applicants are represented by attorneys, many are represented by victim advocates, and others appear without representation. Necessarily the hearings are very informal. These hearings would not qualify as "conference" hearings without the adoption of a regulation as facts are disputed and the amounts claimed are frequently greater than $1,000. Nor is it clear that the conference hearing is sufficiently flexible to allow the degree of informality required.

The most formal of the Board's hearings are those conducted to resolve a protest of a procurement decision. In these cases the Board is presently employing an attorney hearing officer. In the past the Board has referred some of these cases to the Office of Administrative Hearings. This proved to be extremely expensive and resulted in lengthy delays seriously interfering with the State's procurement needs. One case referred to OAH consumed approximately six months from referral to OAH to receipt of a proposed decision. In contrast, referral to the Board's own hearing officer of the most difficult cases requires approximately six weeks. The Board of Control's total cost per hour for a hearing conducted by its hearing officer is $50. This contrasts to a cost of $170 per hour for a hearing conducted by the Office of Administrative Hearings. The parties to the protests appear to feel that they have received a fair hearing as they have not sought writs challenging the conduct of these hearings.

Professor Asimov's study and early drafts of the new statute reflected a premise that the new Administrative Procedures Act would serve as the standard for adjudication by state agencies. However, the study and earlier drafts reflected the understanding that that standard was not appropriate for all adjudications conducted by state agencies. Thus, the drafts created a "default" procedure. The act would apply unless a state agency adopted rules adopting procedures which deviated from the act. These procedures were to be adopted as regulations which insured the opportunity for public review and comment as to the appropriateness of deviations from the standard APA. The Tentative Recommendation has now sharply deviated from this earlier approach and imposes all of the requirements of the act on many more state agencies and imposes many specific requirements on all state agencies.

This revised approach is reflected in §641.450. Unlike current law and unlike previous drafts, this section now requires that all hearings be conducted by an administrative law judge employed by the Office of Administrative Hearings unless an agency is specifically and statutorily exempted from this requirement. Under current law only those agencies listed in Government Code §11501 are subject to this requirement. Many other agencies having adjudicatory responsibilities are not listed in that statute, but may not have a statute specifically exempting the agency from this requirement as such a statute would be superfluous. We believe that enactment of §641.450 in its present form will have the unfortunate result of subjecting to the most rigid requirements of the new act those hearings for which the act is least amenable.

The State Board of Control has authority to have its cases heard by hearing examiners who are not administrative law judges employed by the Office of Administrative Hearings. This authority was enacted prior to the effective date of the current Administrative Procedures Act and does not specifically reference that act. Government Code §13908 states:

> The evidence in any investigation, inquiry, or hearing may be taken by the member to whom the investigation, inquiry, or hearing has been assigned or, in his or their behalf, by an examiner designated for that purpose. Every finding, opinion, and order made by a member so designated, pursuant to investigation, inquiry, or hearing, when approved or confirmed by the board and ordered filed in its office at the State Capitol, Sacramento, is the finding, opinion, and order of the board.

We believe that this section would exempt the Board from the requirement of proposed §641.450. However, we are concerned that a challenge to this exemption might be brought as the Board's exemption does not specifically reference the Administrative Procedures Act or the Office of Administrative Hearings. Therefore, we believe §641.450 should be proposed as set forth in earlier drafts. An administrative law judge employed by the Office of Administrative Hearings should be required for only those proceedings for which a statute specifically requires they be conducted by an administrative law judge employed by the office.

We are also concerned with the limited ability of state agencies not required to utilize the Office of Administrative Hearings to modify the requirements of the proposed act to meet their unique needs. The Tentative Recommendation appears to allow these agencies to modify only those requirements set forth in Chapter 2 of Part 4 relating to commencement of proceedings, Chapter 5 of Part 4 relating to discovery, and Chapter 8 of Part 4 relating to the conduct of the hearing. Yet many of the other provisions of the proposed act would have a costly and detrimental effect on the State Board of Control.

For example, proposed section 613.230 would impose the rule that when service is made by mail any response period is extended by five days. The Victims of Crime Program (Government Code §13959 et seq.) imposes various statutory notice periods. These have been found to be workable for applicants and for the Board of Control. They were adopted and implemented with the understanding that service by mail did not extend the time. Had service by mail been intended to extend these times, each time period might have been five days shorter. The enactment of this proposal would require the Board to either extend all of these timelines by five days, necessitating a costly reprogramming of its automated system with resultant delays in processing and payment of victims' claims, or to seek legislation shortening its statutory timelines. This is but one example of how a seemingly insignificant requirement should not be imposed on all state agencies.

We urge that state agencies be given the authority to deviate from any of the model requirements.

Further, while requiring that any such deviation be accomplished by means of a rulemaking action following the opportunity for public review and comment would insure that the interests of those coming before the agency are protected, this, too, is unnecessary and costly. Persons entitled to an adjudicatory decision are entitled to due process. Agency reliance on rules or procedures not available to those subject to those rules is a violation of due process. However, formal rulemaking is a costly process. The State Board of Control is experiencing significant funding problems. The Board's general fund programs have experienced a 40% loss of revenue in the last three years. Authorized expenditures in the Victims of Crime Program currently exceed revenue by approximately 100%. Requiring state agencies to undertake massive and costly rulemaking is inappropriate.

Thank you for the opportunity to comment on the Tentative Recommendation. We will await the Commissions Recommendation to the Legislature.

Sincerely yours,

Catherine Close

Catherine Close
General Counsel
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STATE OF CALIFORNIA
PETE WILSON, Governor

PUBLIC UTILITIES COMMISSION
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August 30, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Attn: Nathaniel Sterling, Executive Secretary

Comments of the Legal Division of the Public Utilities Commission on the Tentative Recommendation on Administrative Adjudication

Dear Commissioners and Mr. Sterling:

The following are the comments of the Legal Division of the California Public Utilities Commission (PUC or Commission) on the California Law Revision Commission's tentative recommendation on administrative adjudication (proposed new APA).

The work of the PUC is quite different from that of most other state agencies. Because of its unique responsibilities, the PUC's specialized procedures are established by comprehensive legislation contained in the Public Utilities Code, and pursuant to the PUC's constitutional authority to establish its own procedures (subject to due process and statute). (See Cal. Constitution, art. XII, §2.) It therefore is not appropriate to include the PUC within the scope of a single statute to govern administrative adjudication by state agencies generally.[1]

Throughout the course of the Law Revision Commission's study of administrative adjudication, we have pointed out that the PUC's work is so different from that of most other agencies that the PUC's "adjudications" should not be governed by rules written for other agencies. We acknowledge that some flexibility has been built into the proposed new APA, and that some proposals that we objected to earlier have been modified or not incorporated into the proposed new APA. Still, as explained in greater detail below, we continue to be of the view that procedures that can be incorporated into a single Administrative Procedure Act which may be appropriate for the kind of cases typically handled by other state agencies simply will not work at the PUC.

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1 Accordingly, we agree that the work of the PUC's Administrative Law Judges (ALJs) should not be shifted to a central panel. The use of central panel judges would deprive the PUC of necessary expertise and control over its own workload.

The treatment of individualized ratemaking[2] and initial licensing cases under the proposed new Administrative Procedure Act (APA) most readily demonstrates the inappropriateness of subjecting the PUC's "adjudications" to the proposed new APA. (Individualized ratemaking and initial licensing cases comprise a large portion of the PUC proceedings that would be covered by the proposed new APA.) The proposed new APA would treat these cases as "adjudications" (see Comment to §610.310), and generally subject them to the same procedural requirements as would apply, for example, to unemployment and workers compensation benefit cases.[3] Such benefit cases look primarily at what happened sometime in the past (adjudicative facts). On the other hand, individualized ratemaking and initial licensing cases rely in large part on legislative facts, the kind of facts that are useful for predicting future events and establishing the rules and rates that a utility should observe in the future, or deciding whether it is desirable for a utility to build additional facilities or for an additional utility to be granted a license.[4]

The California Supreme Court has repeatedly recognized the legislative character of PUC ratemaking cases. "In adopting rules governing service and in fixing rates, [the PUC] exercises legislative functions delegated to it and does not, in so doing, adjudicate vested interests or render quasi-judicial decisions . . ." (Consumers Lobby Against Monopolies v. Public Utilities Commission (1979) 25 Cal. 3d 891, 909 quoting Wood v. Public Utilities Commission (1971) 4 Cal. 3d 288, 292.) "The commission's primary task is to assimilate [the views of the various parties] into a composite 'public interest'". (25 Cal.3d at 909.) Thus policymaking assumes a predominant role in such cases, as it does in a broad range of PUC proceedings. We submit that it is inappropriate to subject such cases, where legislative

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2 "Individualized ratemaking" refers to the setting of rates for a specifically named utility.

3 The federal APA, on the other hand, defines ratemaking as "rulemaking" (see Comment to § 610.310).

4 Such an initial licensing case is not like a case concerning whether an individual should be granted a professional license. In a professional license case primarily adjudicative facts are at issue: does the applicant meet the minimum training and competency standards, or has the applicant committed some act that disqualifies him from receiving a license, etc.

facts are most prominent, to procedures designed for cases that look mostly at adjudicative facts, such as benefit determination cases.

In several instances, the proposed new APA seeks to shift authority from the agency head to the administrative law judge (ALJ). See, for example, §649.150, allowing an ALJ's proposed decision to become a final decision without affirmative action by the agency head. See also §§649.230(c), 649.240(a)(2), requiring that a remand generally be to the ALJ who originally heard the case. While it can be argued that such procedures are appropriate where a decision primarily determines adjudicative facts, they are clearly inappropriate in cases where legislative facts and policymaking functions are predominant. The Public Utilities Commission (and not its ALJs) has been given policymaking authority by the State Constitution and the Legislature. Thus, for example, if the Commission wishes to remand a case for further proceedings, and it believes that the case should not go back to the original ALJ because of policy disagreements between that ALJ and the Commission, the Commission should be free to reassign it to a different ALJ.

The constitutional and statutory provisions governing the PUC further demonstrate that it is different than most other state agencies. Thus, the PUC is a constitutionally created agency. (See Cal. Constitution, art. XII.) In addition to the specific powers granted the PUC by the Constitution and statute the PUC "may supervise and regulate every public utility in the State and may do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." (Public Utilities (P.U.) Code §701.) In order not to unduly restrict the PUC in its exercise of these powers, the Legislature has generally exempted the PUC from the rulemaking provisions of the existing APA (see Government Code §11351) and has provided for direct review of PUC decisions by the California Supreme Court (see, e.g., P.U. Code §1759). These provisions all recognize the PUC's need for a broad range of flexibility in order to succcessfully regulate in a timely manner the safety and economics of major utility industries. As further demonstrated in the specific comments below, subjecting the PUC to the proposed new APA would unnecessarily and unduly interfere with the PUC's ability to perform its duties.

Comments on Specific Sections of the Proposed New APA

Sections 610.190 & 610.460: The definitions of "agency" and "party" are highly confusing as they might apply to the PUC. The PUC is clearly an agency under 610.190 and appears to be "the agency that is taking action" under 610.460. However, the PUC is not a party to proceedings before the Commission. (Cf. §610.460 "party . . . includes the agency that is taking action".)

Typically, one of the PUC's staff Divisions (e.g. the Division of Ratepayer Advocates (DRA) or the Transportation Division) appears as a party in Commission proceedings.[5] Moreover, it is not clear whether the DRA is an "agency". An administrative unit within an agency can itself be an agency "[t]o the extent it purports to exercise authority pursuant to any provision of this division". Because the DRA has no authority to issue decisions or take other similar action it does not appear to fit within the definition of agency. Because these key definitions are unclear and do not comport with the reality of practice at the PUC, it is sometimes unclear how operative sections of the proposed new APA are supposed to apply to the work of the PUC.[6]

Section 610.310: As discussed above, this section is overbroad. Furthermore, the Comment suggests that PUC ratemaking and licensing actions of general application addressed to all members of a class are subject to the APA's rulemaking provisions. Such PUC actions are not currently subject to the APA, nor would the current recommendation make them subject to the APA's rulemaking provisions.

Section 641.110(a): states that an "agency shall conduct a proceeding under this part . . . [before] issuing a decision for which a hearing or other adjudicative proceeding is required . . ." However, the term "adjudicative proceeding" is not defined, leaving the meaning of this provision in some doubt.

Sections 641.310 - 641.380: The word "section" in §641.310(c) should be replaced by the word "article". When there is other express statutory authority for an emergency decision, that other section should govern the proceedings. Compare §612.150 (contrary express statute controls).

The PUC is directed by existing statutes to summarily suspend or revoke the operating authority of motor carriers: (1) upon receipt of written recommendation from the California Highway Patrol (CHP) that the motor carrier has consistently failed to abide by certain safety regulations or that the carrier's operations present an imminent danger to public safety (see, e.g., Public Utilities (P.U.) Code §1070.5); and (2) when the motor carrier has failed to pay a final judgment to an employee pursuant to §3716.2 of the Labor Code (see, e.g., P.U. Code

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5 However, in many complaint proceedings only the utility and the private complainant are parties and staff does not participate.

6 See, e.g., proposed §648.520(a)(1), (b)(1) referring to "an employee of an agency that is a party".

§1070.6). (See the discussion below as to why these P.U. Code sections should be retained.) It is unclear how these statutes would interact with these sections of the proposed new APA if the change in §641.310(c) suggested in the preceding paragraph is not made. The proposed new APA should make it clear that an agency granted emergency-type powers by another statute can follow the procedures required by that statute, without having to comply with additional restrictions that might be required if it were acting under these provisions of the APA.

In addition, §641.380 of the proposed new APA appears inconsistent with current law which vests exclusive power to review the PUC's decisions with the Supreme Court. (See P.U. Code §1759.)[7]

Section 642.240: The Comment to this section indicates that an agency not required to use Office of Administrative Hearings ALJs may make the section inapplicable by issuing a regulation. However, the text of subsection (a) is less clear. A requirement to issue regulations establishing timelines for processing applications may make sense for agencies that handle a specific number of routine kinds of applications. However, the PUC handles a nearly infinite variety of applications. Even just in the area of ratemaking, applications can run the gamut from: (a) a relatively simple application by a small water company to increase its rates to reflect increased costs for the water it buys; to (z) a very complex application by a large gas and electric utility to restructure the way the PUC sets its rates to incorporate more incentives. Thus in this area, as well as many others, the PUC has a unique need for flexibility.

Section 643.130: This section would apparently authorize the Governor to appoint a substitute PUC Commissioner if the PUC was unable to take action in a proceeding because of the disqualification or unavailability of a Commissioner or Commissioners. To the extent that this section would authorize such a substitute PUC Commissioner, it would appear to violate Section 1 of Article XII of the California Constitution. That section of the Constitution requires Senate confirmation of a PUC Commissioner, establishes a 6 year term for Commissioners, provides that a vacancy is filled for the remainder of the term, and establishes the procedures and circumstances under which the Legislature may remove a Commissioner.

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7 The tentative recommendation currently before the Law Revision Commission does not propose to change this statute.

Section 643.330(a)(4), (5): These subsections allow a person who has served, or is now serving, as an investigator or advocate in a nonprosecutorial proceeding to provide advice to the presiding officer or a reviewing authority "provided the content of any advice is disclosed on the record and all parties have an opportunity to comment on the advice." The quoted provision will interfere with the PUC's ability to issue rate case decisions. Typically, major rate case decisions are issued just before the end of the year, so that new rates can go into effect on the first of the year. In the course of compiling the final numbers for the decision, it is often necessary to consult with technical personnel in order to calculate the impact of particular policy decisions on rates. The PUC normally relies on its separate advisory staff (Commission Advisory and Compliance Division or CACD) to provide such advice. However, due to staff rotation and the long-running nature of some rate case proceedings, personnel currently working in CACD may have previously worked on the same case while serving in the advocacy staff (Division of Ratepayer Advocates or DRA).[8] In addition, some technical expertise may reside only with the staff currently working on the case for DRA. While these subsections would authorize the ALJ or the Commission to obtain the advice they need, they could only do so if the content of the advice is disclosed on the record with an opportunity for all parties to comment. The delay this would create would make it impossible for the Commission to issue rate case decisions in a timely manner.

Furthermore, the requirement that the advice be disclosed on the record would have the effect of making public the Commission's internal deliberative processes. For example, consider the situation where the Commission asks an advisor who would be covered by these provisions what the impact of a particular policy decision would be on the various calculations that appear in the appendices to a Commission rate decision. Presumably, in order to comply with the quoted requirements of these subsections the advisor would have to disclose both the question she was asked and the various numbers that she advised the Commission should be included in particular places in the

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8 In some areas, for example certain licensing issues handled by the PUC's Transportation Division, there is not a complete separation of functions at the PUC. This reflects the need for administrative efficiency (consider the difficulties of having two staff members familiar with all matters), which sometimes conflicts with the perfection the proposed new APA seeks.

various tables.[9] This would have the effect of revealing to the parties the policy decision that the Commission was contemplating making. We submit that it is inappropriate to require an ALJ or the Commission to reveal its internal deliberations about what policy decisions ought to be made.

There are likely to be several other untoward impacts of the above-quoted requirements. First, a disclosure like that described in the preceding paragraph is likely to engender comments not so much on the accuracy of the calculations made by the advisor, but more about the wisdom of making the policy decision the Commission was contemplating. This intervention is simply unnecessary and will engender delay. Second, besides the highly technical advice provided by CACD, that Division also provides the ALJ and the Commissioners with policy advice. As explained above, the requirement that the advice given by the advisor be disclosed on the record will have the effect of revealing the Commission's internal thought processes. Accordingly, the Commission will likely never want to get policy advice from a CACD employee who is subject to these disclosure provisions. Rate cases can continue for seven years or longer and are often consolidated with other proceedings involving the same utility or other utilities in the same industry, and can come to involve multiple issues besides the ones on which a particular staff member once worked for DRA. Nevertheless, if such an employee moved from DRA to CACD, the employee would not be able to provide advice in that proceeding (including any "adjudicative" proceedings consolidated with it), unless that employee's advice is disclosed on the record. That employee, because she is familiar with the industry involved, may be the most expert person to advise the ALJ or Commissioner. Nevertheless, because requesting advice from that person will wind up revealing the policy direction being considered by the ALJ or Commissioner, the advice may well not be requested. In short, these provisions will encourage the Commission to make inefficient use of its staff expertise and discourage the Commission from providing for staff rotations that help to develop expertise. These provisions will add nothing to the fairness of the PUC's existing procedures, which are already controlled by an ex parte rule.

Section 643.340: The language of this section is unclear. This section should not apply to nonprosecutorial proceedings where ex parte contacts are permitted. Nor should it prohibit CACD personnel who may have received an ex parte contact from

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9 The need to make such disclosures would be cumbersome and time consuming and would tend to delay the Commission's decisionmaking process.

providing advice on the request of a Commissioner. Such provisions would prevent the PUC from taking advantage of the in-house staff advice needed to decide cases accurately and in a timely fashion. The PUC's existing ex parte rule provides sufficient fairness protections.

Section 644.110: This provision could unduly limit public participation in Commission proceedings. Rule 54 of the Commission's Rules of Practice and Procedure currently provides:

> Participation Without Intervention.
>
> In an investigation or application proceeding, or in such a proceeding when heard on a consolidated record with a complaint proceeding, an appearance may be entered at the hearing without filing a pleading, if no affirmative relief is sought, if there is full disclosure of the persons or entities in whose behalf the appearance is to be entered, if the interest of such persons or entities in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed.
>
> A person or entity in whose behalf an appearance is entered in this manner becomes a party to and may participate in the proceeding to the degree indicated by the presiding officer.
>
> (Cal. Code Regs., tit. 20, §54.)

Thus, in order to become a party to an application or investigation proceeding,[10] a person or entity only needs to show up at the hearing or prehearing conference and make a few simple disclosures. The proposed section would impose additional procedural hurdles (require the person or entity that wants to become a party to file a motion) and appears to allow the ALJ to deny party status where the current rule requires the ALJ to grant party status. (Compare Rule 54 with subsection (d) of

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10 Most ratemaking and initial licensing hearings occur in application and investigation proceedings. These proceedings may also include other kinds of hearings.

§644.110.) Such additional impediments are not appropriate for proceedings such as ratemaking proceedings where the Commission's "primary task is to assimilate [a wide variety of public positions] into a composite 'public interest'". (Consumers Lobby, 25 Cal.3d at 909.)

Section 647.210(b): The language of this subsection should not prohibit agencies from adopting Alternative Dispute Resolution (ADR) techniques different than those authorized by §647.210, where agencies have the power to do so. This subsection authorizes an agency to make Article 2 "inapplicable" by issuing a regulation, but does not authorize an agency to modify the article by regulation. The subsection therefore might be read as not allowing an agency to adopt different ADR techniques, even though the agency has other authority to do so. Such a result is not appropriate for the PUC which "[s]ubject to statute and due process . . . may establish its own procedures." (California Constitution, art. XII, §2.)

Section 648.510: This section would authorize the PUC to adopt a different ex parte rule for "nonprosecutorial" proceedings. However, in light of the language of some other sections, e.g., §648.520(b)(2), it is unclear how much discretion the proposed new APA would actually give the PUC in drafting such a rule. In fact, the PUC has already adopted its own ex parte rule. See Cal. Code Regs., tit. 20, Art. 1.5. We submit that the PUC's own rule is better adapted to the unique functions of the PUC. Given the problems that might arise from attempting to comply with the more specific provisions of the proposed new APA, discussed below, we believe that the PUC should retain discretion to adopt its own ex parte rule.

Section 648.520: This section appears to prohibit, or at least require disclosure of, ex parte contacts whether or not they relate to a particular adjudicative proceeding. The same parties regularly appear in numerous PUC proceedings, both proceedings that would be treated as "adjudications" under the proposed new APA and those that would be defined as rulemakings. Moreover, the Commissioners regularly have contacts with utility and ratepayer representatives about numerous issues -- many of which may not be involved in any pending proceeding. There is no reason for a proposed statute dealing with "adjudications" to prohibit or require disclosure of contacts concerning issues that are not involved in a pending "adjudicative" proceeding. Compare the PUC's ex parte contact rule defining an "ex parte communication" as "a written or oral communication on any substantive issue in a covered proceeding, between a party and a decisionmaker, off the record and without opportunity for all parties to participate in the communication." (Cal. Code Regs., tit. 20, §1.1(g) (emphasis added).)

In subsection (a)(2), the reference to "an interested person outside an agency that is a party" is unclear. Communications between the presiding officer and a party are already covered by (a)(1).

At the PUC, the General Counsel is both the Commission's attorney and a supervisor of the attorneys who represent DRA and other staff advocates in Commission proceedings. The proposed new APA should not prohibit or require disclosure of communications between the General Counsel and the Commissioners or their advisors when the General Counsel is acting as the Commission's attorney. Compare the PUC's ex parte rule which exempts such communications from disclosure. (See Cal. Code Regs., tit. 20, §1.1(b)(2), (g), (h).)

When the Commission is concluding its work on a major rate case decision, it is sometimes necessary to contact utility personnel in order to ensure the accuracy of the final numbers for the decision. Under the proposed new APA, although the provisions are not entirely clear, it appears that such a communication might be required to be reported and an opportunity for comment provided. We submit that such notice and an opportunity to comment should not be required. As explained earlier, major rate cases are typically on a very tight time schedule and any such requirement could delay the case considerably, especially if other parties must be given 10 days in which just to "request" an opportunity to comment. (Compare §648.540(c).) Furthermore, any justification for notice and opportunity to comment is attenuated here. First, the contact is initiated by the Commission's staff to obtain specific advice that the Commission needs. In addition, there is no direct contact between the utility and the presiding officer or reviewing authority. Any advice that the utility gives is filtered through the expert CACD staff, who can detect and stop any improper lobbying.

Section 648.540: Subsection (a) apparently requires disclosure of the response of a presiding officer, or reviewing authority, to an ex parte contact. Subsection (b) further contemplates that the presiding officer or reviewing authority will review the disclosure for accuracy, when the disclosure is made by the party making the ex parte communication. In contrast, the PUC's ex parte rule specifically excludes from disclosure a description of the decisionmaker's communication. The PUC's rule also requires the party making the ex parte communication to make the disclosure, and does not require any review by the decisionmaker. (See Cal. Code Regs., tit. 20, §1.4(a).) The PUC rule excludes reporting of what the decisionmaker said, in large part, because of the likelihood that parties may mischaracterize the decisionmaker's statements, perhaps in self-serving ways. If PUC Commissioners have to review the disclosure, in order to avoid this problem, that will burden Commissioners and interfere with their ability to fulfill their numerous responsibilities. A side effect of this burden,

might well be to discourage the Commissioners from receiving permissible communications in ratemaking and similar proceedings. Given the legislative nature of such proceedings, we submit that the statute should not impose such a burden on communications with Commissioners. As stated above, we believe that the PUC should be authorized to craft its own ex parte rules.

Section 649.130 apparently would require issuance of a proposed decision even in cases in which the Legislature has determined that no proposed decision need be issued. See P.U. Code §311 and the implementing regulation, Cal. Code Regs., tit. 20, §77.1.

Section 649.150: This section would allow an ALJ's proposed decision to become a final decision without affirmative action by the Commission. As pointed out in the introduction to these comments, that is inappropriate because the Commission (and not its ALJs) has been given policymaking authority by the State Constitution and the Legislature. The Commission could prevent any ALJ decisions from becoming final by issuing a regulation requiring administrative review of every proposed ALJ Decision. Such an option, however, would introduce unnecessary procedures, at least in some cases. Consider the situation where an ALJ proposes to grant a motion for a summary judgment. Because no hearing has been held, no proposed decision is currently required. (See Cal. Code Regs., tit 20, §77.1.) Under current law the Commission is free to revise the ALJ's draft decision without providing for any additional argument. Nor would it appear that any additional argument is necessary, because the parties have already briefed the motion for summary judgment. In addition, any party who believes that the Commission's decision is legally erroneous can file for rehearing. (P.U. Code §§1731(b), 1732.) Nevertheless, under the proposed new APA, in order for the Commission to reserve the right to modify the ALJ's proposal, it apparently would have to afford the parties an opportunity for additional argument before issuing a final decision. (See §649.230(b).) This is another example of how existing statutes are more appropriate for the PUC than the proposed new APA, and is yet another reason why the PUC should be left out of the proposal.

Section 649.160: would extend the time for judicial review under certain circumstances. This could undermine the current statutory program for review of PUC decisions, which is designed to secure prompt review and finality for PUC decisions. Under current law, a party cannot apply for judicial review of a PUC decision unless it applies to the PUC for rehearing within 30 days after the PUC mails the decision. (See P.U. Code §1731(b).) A party must apply to the California Supreme Court for review within 30 days after the PUC acts on the application for rehearing. (See P.U. Code §1756; see also P.U. Code §1733 (situations under which a party can deem an application for

rehearing to have been denied).) Since a party must apply to the PUC for rehearing before seeking judicial review, it is unclear just how the PUC would comply with subsection (a), which apparently contemplates a right to seek judicial review without applying for rehearing. It is likewise unclear, how much additional time the party would have to apply for rehearing or judicial review if the PUC inadvertently failed to provide a required notice. In any event, however, it seems that this provision could introduce undesirable uncertainty into when a PUC decision has become final and is no longer subject to judicial review. It can be argued that allowing additional time for judicial review is desirable when the rights of a single individual and primarily private interests are being adjudicated. Such a provision seems inappropriate for PUC proceedings which often have multiple parties, and for decisions that can impact the rates paid by millions of consumers.

Section 649.170: The PUC often makes its decisions effective immediately. Nevertheless, a party is free to file a petition for modification requesting correction of a mistake or clerical error at any time thereafter, even if a party has filed an application for rehearing claiming legal error. In contrast, an application under proposed §649.170 cannot be made after the effective date of a decision, or after administrative review has been initiated. It does not appear that such restrictions should apply to the PUC.

Sections 649.230 & 649.240: As explained in the introductory portion of these comments, the PUC should remain free to determine to what ALJ it should assign a remand.

Sections 649.310 - 649.330: All current PUC decisions are available through the Lexis electronic service. (See P.U. Code §323.) Furthermore, the PUC has never limited the ability of parties to citing only specifically listed "precedent" decisions.[11] A provision requiring the designation of "precedent " decisions may make sense for agencies that issue hundreds of nearly identical decisions (composed from stock paragraphs) that are not readily available. Such a provision makes no sense for the PUC where most decisions are individually crafted and potentially useful as precedent in future proceedings, and where all current decisions are available through an electronic research service to which many lawyers subscribe. The PUC does publish some selected decisions in hard

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11 Public Utilities Code §1705 does provide that PUC decisions under the expedited complaint procedure (P.U. Code §1702.1) are not precedential.

copy. Those selected decisions are indexed by subject matter at the back of each volume. However, in order to allow parties the right to cite all potentially relevant cases as precedent, the proposed new APA would require that, starting in 1996, the Commission index all of its decisions. Given that the Commission's decisions are available on the Lexis service, there is no reason to require the PUC to incur this unnecessary expense.

Section 650.120: As mentioned above, the Commission often makes its decisions effective immediately. (See P.U. Code §1731(a) authorizing this practice.) The proposed section would appear to restrict the Commission's ability to grant a stay of a decision after the decision has become effective. In light of the PUC's continuing and general jurisdiction over utilities, and the fact that a party cannot apply for judicial review without first applying for rehearing (P.U. Code §1731(b), it makes no sense to prohibit the Commission from issuing a stay after a decision has become effective. Indeed, P.U. Code §1733(b) authorizes such a practice under certain circumstances (when an application for rehearing has been filed, the decision has become effective, and the PUC has not completed action on the application for rehearing within 60 days).

Concluding Comments: As shown above, many of the mandatory provisions of the proposed new APA are inappropriate for the PUC. It makes little sense to try to accommodate the PUC's unique functions and situation by giving the PUC additional authority to issue regulations which would allow it to modify or opt out of even more provisions of the proposed new APA. Little of the proposed new APA would actually apply to the PUC and the PUC would have to go through considerable unnecessary effort to promulgate regulations simply restating current law. The PUC's Legal Division submits that the wiser course of action is simply to recognize the uniqueness of the PUC by leaving it out of the proposed new APA.

Further considerations support this conclusion. In addition to those situations where the proposed new APA requires "adjudicative proceedings", the PUC also uses hearing-type procedures to set rates for (or otherwise regulate) a class of utilities. These proceedings are not subject to the proposed new APA, and the procedures contained in the proposed new APA are certainly not appropriate for such proceedings. Furthermore, the PUC conducts rulemakings without conducting evidentiary hearings. (See Cal. Code Regs., tit. 20, Art. 3.5.) Thus, subjecting the PUC to the proposed new APA would apparently require the PUC to have three different sets of procedural rules (i.e. one for "adjudicative proceedings", one for hearing-type procedures used in other situations, and one for rulemakings.) Furthermore, proceedings that the proposed new APA treats as "adjudications" are often consolidated with proceedings that would not be subject to the proposed new APA. Thus, there could

easily be confusion as to whether or how the proposed new APA would apply to a particular PUC hearing or PUC decision.[12] All of these factors argue for leaving the PUC out of the proposed new APA.

Specific Public Utilities Code Sections that Should Not Be Repealed

The PUC Legal Division submits that no provisions of the Public Utilities (P.U.) Code should be repealed, because the proposed new APA should not apply to the PUC. Even if the proposed new APA were to apply to the PUC, most of the existing statutory provisions would have to be retained (although they might have to be rewritten for clarity). As explained above, the PUC often conducts evidentiary-type hearings in proceedings that are not covered by the proposed new APA. For example, the PUC often conducts evidentiary hearings in cases that set rates for a whole class of utilities. Accordingly, the PUC would need to retain the current statutory provisions governing its hearing procedures to apply to hearings that would not be subject to the new APA.

In addition to these general reasons why P.U. Code sections should not be repealed, there are more specific reasons why individual P.U. Code sections should not be repealed. The following paragraphs list many of these sections and briefly explain the specific need for their retention.

P.U. Code §310: The PUC's longstanding practice is to assign one (or more) Commissioner(s) and an ALJ to each proceeding. This practice is authorized by P.U. Code §§310 & 311(b). The assigned ALJ typically acts as the presiding officer and is always present during the hearings. However, the assigned Commissioner may act as the presiding officer on occasion, and most importantly, may issue an assigned Commissioner's ruling. Such rulings typically dispose of important procedural points in a proceeding. Given the central role of policymaking in PUC "adjudications" (as discussed above), it is imperative that the

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12 The definition of "decision" contained in the proposed new APA does not encompass all of the opinions and orders that the Commission issues. Nevertheless, in common parlance they are all decisions. If the PUC will have to restrict its use of the term to those opinions and orders that are "decisions" within the meaning of the APA (even if just in order to avoid confusion), then it will likely have to create new terminology and amend its existing statutes and regulations that cover matters that do not fall within the proposed new APA.

assigned Commissioner or Commissioners be able to determine the course of a proceeding by deciding matters such as which issues should be considered during the various phases of a proceeding. It is important that the assigned Commissioner have this authority, even though the assigned Commissioner typically is not present for most of the proceeding. Accordingly, section 310 should be retained, inter alia, so that the Commission can continue to assign a Commissioner to each proceeding, without any doubt as to the propriety of this practice pursuant to proposed §643.110.[13]

P.U. Code §311: In addition to the reasons discussed above, there are a number of other reasons why this statute should be retained. Subsection (d) makes it clear that only the Commission, and not an ALJ, can issue a final decision. (See the last two sentences of subsection (d).) Subsection (d) also establishes the framework under which the Commission receives comments on an ALJ's proposed decision. That subsection generally requires a 30 day period after the filing and service of a proposed decision before the Commission can issue its decision. Article 19 of the PUC's Rules of Practice and Procedure then establishes the comment procedure that occurs during that period. (Cal. Code Regs., tit. 20, art. 19.) Section 311 also implements the PUC's constitutional authority to issue subpoenas. (See Cal. Constitution, art. XII, §6; P.U. Code §311(a) & (b).)

P.U. Code §312: This section implements the PUC's constitutional authority to punish for contempt. (See Cal. Constitution, art. XII, §6.) In contrast, the proposed new APA would only authorize superior courts to punish a person for contempt before the agency. (See proposed §648.620.) Given the PUC's constitutional authority to punish for contempt, it should not be limited to the procedures provided by the proposed new APA.

P.U. Code §325: This section provides the Commission with some detailed guidelines for establishing expedited procedures to be followed when the President of the United States declares an emergency. This section deals with a more limited set of circumstances than is covered by §§641.310 - 641.380 of the proposed new APA (Emergency Decision). However, it is also not subject to all of the restrictions of those sections. It should

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13 In addition, proposed §643.110 should be drafted so as not to prohibit the assigned Commissioner from functioning as described above.

be retained to allow the PUC to deal with the specific situations it covers as the Legislature thought appropriate.

P.U.Code §454(c): This subsection requires the PUC to permit utility customers, and organizations formed to represent their interests, to testify at certain hearings (subject to certain restrictions). Their right to testify should not be disturbed.

P.U. Code §705: This section provides the method for initiating particular proceedings before the PUC.

P.U.Code §728.5: This section further implements the PUC's constitutional authority to issue subpoenas and punish for contempt. (See Cal. Constitution, art. XII, §6.)

P.U. Code §§1006, 1034, 5379.5, & 7726: These sections provide cease and desist powers that extend to situations not covered by §§641.310 - 641.380 of the proposed new APA (Emergency Decision). The PUC should not be deprived of these powers. Indeed, the proposed new APA should make clear that powers granted by such other statutes are not subject to any additional restrictions contained in those APA sections. Furthermore, §7726(e) specifically authorizes delegation of the PUC's cease and desist power, a matter not specifically addressed by the emergency decision sections of the proposed new APA.

P.U. Code §§ 1033.7, 1070.5, 3774.5, 4022, 5285.6, 5378.5, & 5378.6: These statutes direct the PUC to summarily suspend or revoke the operating authority of motor carriers upon receipt of a written recommendation from the California Highway Patrol (CHP) where: (i) the carrier has consistently failed to abide by certain safety regulations; (ii) the carrier's operations present an imminent danger to public safety: or (iii) the carrier has failed to enroll all drivers in the pull notice system. (See, e.g., P.U. Code §1033.7(a).) While the situation described in (ii) would be covered by the emergency decision sections of the proposed new APA, the other two situations would appear not to be. (Compare proposed §641.320(b).) There is no reason to disturb the Legislature's decision that these other two situations also justify summary suspension.

Another reason for retaining these P.U. Code sections is that the emergency decision sections of the proposed new APA are designed to deal with the situation where a single agency both determines that emergency action should be taken and then takes action. Under these P.U. Code sections the CHP determines that there should be a summary suspension and the PUC then suspends the carrier's operating authority. (See, e.g., P.U. Code §1033.7(a).) The PUC does not exercise any discretion in

initially suspending the carrier's operating authority.[14] Therefore, it is the CHP which provides the motor carrier with notice and an informal opportunity to be heard before the PUC can act. (See, e.g., P.U. Code §1033.7(c)(3).) In contrast, §641.330(a) of the proposed new APA apparently would require the PUC to give the respondent notice and an opportunity to be heard before the PUC could take action. Similarly, under §641.340 of the proposed new APA, the agency is to issue an emergency decision explaining the basis for its action. However, given the respective roles of the PUC and the CHP, the P.U. Code sections direct the CHP to provide the motor carrier with the basis for the CHP's recommendation that the carrier's operating authority be suspended. (See, e.g., P.U. Code §1033.7(c).)

These P.U. Code sections provide different time periods and methods for obtaining further consideration of the underlying issues than would be provided under the emergency decision sections of the proposed new APA. (See, e.g., P.U. Code §§1033.7(b) & (d).) These provisions are tailored to the specific situations that these P.U. Code sections deal with. There is no reason to require additional procedures under §§641.350 and 641.370 of the proposed new APA. Indeed, it would be difficult for the PUC to meet the time period required by §641.370, since the Commission generally meets only once every two weeks.

P.U. Code §§1033.8(b) & (c); 1070.6(b) & (c); 3774.6(b) & (c); 5285.5(b) & (c); 5378.7(b) & (c): These statutes direct the PUC to summarily suspend or revoke the operating authority of a motor carrier when a carrier has failed to pay a final judgment to an employee pursuant to §3716.2 of the Labor Code. As with the CHP statutes discussed immediately above, there is no reason to disturb the Legislature's determination that summary action is justified in this situation, or that the procedures specifically tailored to this kind of suspension or revocation are adequate. Indeed, given the limited factual issues presented (see, e.g., the last sentence of §1033.8(c)), there seems little need here for the more complex emergency decision procedures contained in the proposed new APA.

P.U. Code §§1207 - 1213: These sections provide the particular procedures to be followed when the PUC establishes the just compensation to be paid when property is taken or damaged in a railroad grade separation project. Many of these procedures are unique to such proceedings. Indeed, P.U. Code §1210 provides

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14 Accordingly, the authority to order these suspensions has been delegated to the Commission's staff. It is not clear that the authority to issue emergency decisions could be delegated under the proposed new APA.

for substitute service by means of publication, a method of service not authorized by the proposed new APA.

P.U. Code §§1403 - 1412: These sections provide the particular procedures to be followed when the PUC establishes the just compensation to be paid for utility property being acquired by a political subdivision. In many respects, these provisions are similar to those contained in P.U. Code §§1207 - 1213. Section 1407, like §1210, provides for substitute service by means of publication.

P.U. Code §1701: This section implements the PUC's constitutional authority to establish its own rules of practice and procedure. (See Cal. Constitution, art. XII, §2.) It also provides that "[n]o informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, [or] decision . . . made, approved, or confirmed by the commission."

P.U. Code §1702: This section specifies what complaints may be filed with the PUC. It further requires 25 signatures on certain kinds of complaints.

P.U. Code §1702.1: This section establishes an expedited complaint procedure, similar to small claims procedure, for certain complaints against utilities. A party may not be represented by an attorney, and the proceedings are not reported. The proposed new APA contains no analogous procedure.

P.U. Code §1703: This section specifies that no motion shall be entertained, and no court shall reverse a PUC decision, for misjoinder of causes of action or misjoinder or nonjoinder of parties. It also provides that the PUC shall not be required to dismiss a complaint because there is no direct damage to the complainant. The proposed new APA does not contain any such provisions.

P.U. Code §§1704, 1705, & 1706: These sections (as well as many others) apply both to proceedings that would be covered by the proposed new APA and to proceedings that would not. In addition, §1705 provides that decisions issued under the expedited complaint procedure are not precedential. Section 1706 also specifies the record on court review, a subject not covered by the current tentative recommendation.

P.U. Code §1707: This section specifies that a public utility may file a complaint on any grounds upon which complaints may be filed by other parties, and that such a complaint may be heard ex parte by the PUC.

P.U. Code §1708: This section permits the PUC to rescind, alter, or amend any order or decision made by it (so long as

notice and opportunity to be heard is provided as required in the case of complaints). This is an important provision that defines the extent of the PUC's authority. The proposed new APA contains no comparable provision.

P.U. Code §1731: Subsection (b) grants rights to certain non-parties to file for review (rehearing) of PUC decisions. It also contains provisions requiring exhaustion of administrative remedies within a specified time period as condition of a court challenge. The proposed new APA does not contain any similar provisions. In addition, subsection (a) clarifies that the PUC can make a decision effective before it mails the decision to the parties.

P.U. Code §1732: This section requires specificity in the application for rehearing and bars a court challenge based on any grounds not specifically set forth in the application for rehearing. The proposed new APA does not contain similar provisions. The requirement that a party apply for rehearing before petitioning for judicial review is most important in light of the fact that only the California Supreme Court has jurisdiction to review the PUC's decisions. (See P.U. Code §1759.) This exhaustion of remedies requirement ensures that the PUC has an opportunity to correct any legal errors in its decisions before judicial review, and thus helps to conserve limited judicial resources.

P.U. Code §§1733, 1734, & 1735: Section 1733 provides for certain automatic stays of PUC decisions. There is no similar provision in the proposed new APA. Both sections 1733 and 1735 authorize the PUC to issue stays. The PUC's authority to issue stays under these sections is not limited to the period before the decision becomes effective. Compare proposed §650.120. Sections 1733 and 1734 also permit a party to file a petition for review with the Supreme Court if the PUC does not act on its application for rehearing, or a rehearing, within specified time periods. The proposed new APA does not contain provisions on that subject.

P.U. Code §1736: This section specifies the powers the PUC may exercise when it issues a decision after rehearing. The proposed new APA contains no similar provision.

P.U. Code §1794: This section authorizes the taking of depositions. Unlike proposed §645.130(b)(4), it does not require a showing that the witness "will be unable or can not be compelled to attend the hearing."

P.U. Code §§ 1795, 3741, & 5258: Under these sections the PUC can order a person to give incriminating testimony, and in return the person receives immunity from prosecution. The proposed new APA contains no similar provisions.

P.U. Code §§ 1801 - 1812: These sections authorize compensation for advocate's fees and other costs incurred by public utility customers when participating or intervening in PUC proceedings. The proposed new APA contains no similar provisions.

P.U. Code §§1821 - 1824: These sections deal with the verification of computer models used as the basis for testimony in PUC proceedings. The proposed new APA does not cover this subject.

P.U. Code §§2707, 3731, 3739, 5251, & 5256: These sections apply procedures applicable under the Public Utilities Act (P.U. Code §§201 - 2119) to various other PUC proceedings. As explained above, the Public Utilities Act sections need to be retained; therefore these sections should be retained as well.

P.U. Code §3557(d): This section provides a procedure for summarily suspending the PUC operating authority of an "owner-operator" whose driver's license has been suspended or revoked. The owner-operator has an opportunity, before the PUC takes action, to show cause why his operating authority should not be suspended. Furthermore, the factual issues involved are likely to be simple. Accordingly, the more elaborate procedures required for emergency decisions under the proposed new APA (§§641.310 - 641.380) do not seem necessary here.

P.U. Code §5285(b): This section permits the PUC to suspend the permit of a household goods carrier without a hearing under circumstances not covered by §§641.310 - 641.380 of the proposed new APA (Emergency Decision).

As demonstrated above, numerous procedural provisions of the Public Utilities Code would have to be retained even if the PUC were made subject to the proposed new APA. Thus, rather than simplifying and clarifying the procedural rules applicable to PUC proceedings, subjecting the PUC to the proposed new APA would complicate, and make it more difficult to determine, the procedural rules applicable to PUC proceedings. The Legal Division of the PUC submits that that is one more reason why the PUC should be exempted from the proposed new APA.

Very truly yours,

Peter Arth, Jr.
General Counsel

PAJ:jtp:lk:ltq

STATE OF CALIFORNIA PETE WILSON, Governor

STRS

P.O. BOX 15275-C
SACRAMENTO, CA 95851

John H. Demoully August 31, 1993
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, Ca. 94303-4739

Re: Administrative Adjudication by State Agencies:
Tentative Recommendation

Dear Mr. DeMoully:

This is to express the comments of this office on the above referenced tentative recommendation of the Law Revision Commission. The opinion of the Teachers' Retirement Board has not yet been requested, so any opinions expressed herein are those of the legal office of the State Teachers' Retirement System (STRS). A representative of our office has attended most of the Commission meetings at which the revision of the California Administrative Procedure Act (APA) has been discussed and has reviewed the various rewrites of the Act. We appreciate the opportunity to comment on this tentative recommendation.

It is the opinion of this office that the concept of a universal APA is a seriously flawed one, for the reasons discussed again and again at the Commission meetings. These reasons include the impossibility of applying one act to all state agencies, the costs of changing the administrative practices of the various agencies, and the increased complexity of the proposed Act.

However, recognizing the possibility that the Commission will proceed with this project, we would like to point out two specific provisions to which we object. First, when acting as a reviewing authority, the State Teachers' Retirement Board (Board) would be limited to a review of the record. No additional evidence could be heard, except for newly-discovered evidence or evidence that was otherwise unavailable at the time of the hearing. Under present law, if STRS does not adopt a proposed decision, it may "decide the case upon the record, including the transcript, with or without taking additional evidence...." (Govt. Code, § 11517 (c).) The Act does not permit the option of taking additional evidence, requiring that the Board make its decision based on the record. (649.210.)

Second, credibility determinations of the presiding officer (ALJ) based on observation of demeanor and the like would be entitled to great weight upon judicial review of the administrative decision. Proposed section 649.120 would require an ALJ to include in a proposed decision a statement of the factual and legal basis for the decision as to each of the principal controverted issues. It goes on to state that "If the factual basis for the proposed or

final decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination." This determination would then be entitled to great weight upon judicial review, regardless of the final decision by the Board.

We hope the foregoing comments are helpful to the Commission in its study of the Administrative Procedure Act. Again, we thank you for the opportunity to provide input.

Sincerely,

Lawrence P. Boulger
Chief Counsel

August 30, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Public comment on staff's TENTATIVE RECOMMENDATION of proposed bill on Administrative Adjudication by State Agencies

There are many things about this Tentative Recommendation that are objectionable to me. Further, a lay person such as myself lacks the ability to properly address and articulate these concerns. I do not address all of my concerns because of time constraints; those recommendations not addressed should not be considered endorsed.

Following are some general observations, objections and some recommendations. In general, it appears to me that this proposed bill gives much more power and authority to administrative agencies; at the same time it diminishes the ability of a respondent to defend themselves. It certainly does not address some real problems with administrative adjudication by regulatory agencies. It certainly will not improve the business climate and encourage any new business which is subject to regulation to be established here and it will further deter businesses from locating here as opposed to some other state if they fully investigate and learn the facts. I would not personally recommend to a friend to locate a new business here because of the regulatory climate.

ISSUE: OFFICE OF ADMINISTRATIVE LAW (OAL) FUNDING IS INADEQUATE TO PROVIDE FOR PROPER STAFFING.

This should not be construed to be critical of OAL. All things considered, OAL does a commendable job.

The recommended new statute, which focuses primarily on Administrative Hearings, builds on the existing Administrative Procedure Act which is in significant part failing due to lack of adequate funding for the OAL.

At the present time there is a serious question as to whether OAL has sufficient staff to properly review proposed administrative regulations and to properly review public comments. Regulations have been allowed to become adopted which are clearly unconstitutional.

Additionally, OAL has a large backlog of "Regulatory Determination Decisions" pending, and there is a very significant

number of "Requests for Determination" that have been "Accepted, but which are not under active consideration." I estimate that now OAL has a three (3) year backlog of Regulatory Determination Decisions.

Some consideration needs to be given here to amendments that will guarantee adequate and appropriate funding for the Office of Administrative Law such as provided for under § 641.470 for the Office of Administrative Hearings.

Perhaps some provision could be made for special fund agencies including in their cost of doing business the work being done by the Office of Administrative Law; with a provisions for those funds going directly to OAL.

ISSUE: OAL'S DETERMINATIONS ARE ONLY ADVISORY.

A significant factor to remember is that OAL Regulatory Determination Decisions are advisory only; these decisions are not binding on state regulatory agencies; only a court can force state regulatory agencies to comply with such a Regulatory Determination Decision.

If true regulatory reform is being sought, there should be a provision that Regulatory Determination Decisions of the OAL are binding upon each agency which is not exempt from the Administrative Procedure Act subject only to appeal by the agency in a Court of Competent Jurisdiction.

ISSUE: INCREASED COSTS TO BUSINESS - MORE BURDENS UNFAIR TO REGULATED BUSINESSES

The authors of these proposed statutes seem to have taken the attitude that those who administer the various agencies boards and commissions are impartial and unbiased; these authors seems to forget that an adversarial relationship exists between government and those businesses that are regulated.

Often those serving on these agencies, boards, and commissions are like the foxes guarding the chickenhouse; not to be trusted! Some professional governmental employees are no better, some seem to have "sold out" to self interest groups and are just as suspect.

Currently, some agencies, boards and commissions have adopted regulations that allow them to impose monetary penalties and mandates to cease and desist from alleged improper conduct, subject only to hearing upon request.

State law allows agencies, boards and commissions to access charges to respondents whose prosecution was successful for all investigation and prosecution cost.

Conversely those respondents who are successful in defense of such charges are not given the same consideration, that is, there is no provision for compensation for legal costs for the preparation and defense against such charges. There should be a provision that allows successful respondents to be compensated for their costs for their preparation and defense.

Otherwise this places respondents in very hostile and unfair business environment; some consideration should be given to fundamental fairness. Hostile business climates force potentially higher costs and therefore higher prices for consumers with no increase in benefits. Hostile business climates also reduce revenue for government.

Another serious problem exists in that some agency officials adopt and implement underground regulations and the only recourse available to those adversely affected is civil action. Many sadly lament about the burgeoning litigation; litigation can be expected to continue to increase in intensity and frequency unless some fundamental fairness is introduced in state regulatory policy. It would not surprise me to see some attorneys start to specialize in such civil cases against the state much as many specialize today in personal injury litigation. The citizens of the state are being unfairly subjected to significant potential civil liability by arrogant state agency officials.

ISSUE: PETITIONS ROUTINELY IGNORED BY REGULATORY AGENCIES

Another problem is that governmental agencies seem to routinely ignore petitions under GC 11347. We enjoy a constitutional right to petition our government, but if government agencies routinely simply ignore the petitions, what is the remedy? Certainly civil action, and another remedy supposedly is a Request for Regulatory Determination from the Office of Administrative Law. If its true that OAL is three years behind in issuing Regulatory Determinations; and if it is also true that the Attorney General is going to continue to assert in Demurrer to the courts that administrative remedy has not been exhausted since a Regulatory Determination has not been issued by OAL to prevent trial; and its also true that when the Determination finally is issued it is not binding upon a regulatory agency; if this is the real world situation presently; where is the effective remedy? There needs to be some consideration to enactment of some provision to "make" government agencies respond to petitions guaranteed under the constitution. Presently the code clearly specifies the agencies responsibility to respond. What is the answer, civil damages from the courts?

Another problem here is that these government entities are represented by the Office of the Attorney General which has developed significant expertise in thwarting attempts to obtain effective remedy in the courts, actually preventing trial through repeated demurrers. The issues of standing, ripeness, exhaustion of administrative remedy, and all type of misleading, misdirec-

tion and conniving by the Office of the Attorney General can be expected in their attempts to keep an aggrieved citizen out of court and/or to delay trial.

These proposed statutes enables agencies, boards and commissions to adopt regulations to further their authority and discretion without compliance with the Administrative Procedure Act. See § 610.940. Adoption of regulations - There is no need for this! There already exists provisions for emergency regulations; under the APA which are subject to review by OAL prior to them becoming permanent.

Imagine the significant expense and damages that can be incurred by a business which is adversely effected by such underground regulations, and the very real possibility that the "state will put them out of business before they have the opportunity for their day in court." Also imagine the significant potential civil liability the citizens of the state are being exposed to as a result of this sham of "fairness" by the state in the regulatory process.

There is particular concern with your proposed Article 6.

Article 6. Enforcement of Orders and Sanctions
§ 648.610. Misconduct in proceeding
648.610. A person is subject to the contempt sanction for any of the following in a proceeding before an agency under this part:
(a) Disobedience of or resistance to a lawful order.
(b) Refusal to take the oath or affirmation as a witness or thereafter refusal to be examined.
(c) Obstruction or interruption of the due course of the proceeding during a hearing or near the place of the hearing by any of the following:
(1) Disorderly, contemptuous, or insolent behavior toward the presiding officer while conducting the proceeding.
(2) Breach of the peace, boisterous conduct, or violent disturbance.
(3) Other unlawful interference with the process or proceedings of the agency.
(d) Violation of the prohibition of ex parte communications under Section 648.520.
(e) Failure or refusal, without substantial justification, to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer under Chapter 4 (commencing with Section 645.110), or moving, without substantial justification, to compel discovery.
Comment. Section 648.610 restates the substance of a portion of former Section 11525. Subdivision (c) is a clarifying provision drawn from Code of Civil Procedure Section 1209 (contempt of court). Subdivision (d) is new. Subdivision (e) supersedes former Section 11507.7(i).

§ 648.620. Contempt
648.620. (a) The presiding officer or reviewing authority may certify the facts that justify the contempt sanction against a

person to the superior court in and for the county where the proceeding is conducted. The court shall thereupon issue an order directing the person to appear before the court at a specified time and place, and then and there to show cause why the person should not be punished for contempt. The order and a copy of the certified statement shall be served on the person. Thereafter the court has jurisdiction of the matter.
(b) The same proceedings shall be had, the same penalties may be imposed, and the person charged may purge the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.
Comment. Section 648.620 restates a portion of former Section 11525 of the Government Code, but vests certification authority in the presiding officer or reviewing authority. For monetary sanctions for bad faith tactics, see Section 648.630. For enforcement of discovery orders, see Sections 645.310-645.360.

§ 648.630. Monetary sanctions for bad faith actions or tactics
648.630. (a) The presiding officer or agency may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.
(b) The order, or denial of an order, is subject to administrative and judicial review in the same manner as a decision in the proceeding, and is enforceable by writ of execution, by the contempt sanction, or by other proper process.
Comment. Section 648.630 is new. It permits monetary sanctions against a party (including the agency) for bad faith actions or tactics. Bad faith actions or tactics could include failure or refusal to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer in discovery, or moving to compel discovery, frivolously or solely intended to cause delay. An order imposing sanctions (or denial of such an order) is reviewable in the same manner as administrative decisions generally.
For authority to seek the contempt sanction, see Section 648.620. For enforcement of discovery orders, see Sections 645.310-645.360.

In my opinion there is danger here that individuals/businesses who are belligerently asserting and demanding their rights will be cited for contempt; or otherwise discouraged from exercise of their constitutional rights. This is objectionable.

Comment:

The individual rights guaranteed by our constitution can be compromised or ignored by our government. For example, in U.S. vs. JOHNSON (76 Fed, Supp. 538), Federal District Court Judge James Alger Fee ruled that,

The privilege against self-incrimination is neither accorded to the passive resistant, not to the person who

is ignorant of his rights, nor to one who is indifferent thereto. It is a FIGHTING clause. It's benefits can be retained only by sustained COMBAT. It cannot be claimed by attorney or solicitor. It is valid only when insisted upon by a BELLIGERENT claimant in person. McAlister vs. Henkle, 201 U.S. 90, 26 S.Ct. 385, 50 L. Ed. 671; Commonwealth vs. Shaw, 4 Cush. 594, 50 Am. Dec. 813; Orum vs. State, 38 Ohio App. 171, 175 N.E. 876.

Note the verdicts confrontational language: "FIGHTING", "COMBAT", and most surprising, "BELLIGERENT".

The court ruled that the constitutional right against self incrimination (Article V of the Bill of Rights) is not automatically guaranteed to any citizen by any government branch or official. Moreover, despite the government's usual propaganda, this right is not made available to all persons: It is not available to the "passive", the "ignorant" or the "indifferent". Nor can this right be claimed by an attorney on behalf of his client. The right against self-incrimination is available only to the knowledgeable, "belligerent claimant", to the individual willing to engage in "sustained combat" to FIGHT for his rights.

Here we see that Government claims it is obligated to recognize your Constitutional right against self incrimination only IF YOU FIGHT for that right. The above ruling claims that our courts are free to ignore this right for any citizen who is 1) ignorant of his right and/or 2) lacks the courage to fight for his right. Therefore, anyone who trusts the courts (or even his own lawyer) to protect his Constitutional right against self-incrimination is a fool.

This also applies to other constitutional rights. They must be asserted or they will be lost. Any statute that usurps or discourages this assertion will not stand.

Relative to § 648.450. Hearsay evidence and the residuum rule. I don't understand this proposal. If it allows the state to use hearsay evidence I am opposed and it seems to me that it is unconstitutional. How can a respondent cross examine hearsay evidence. If the state has to resort to hearsay evidence it doesn't have a strong enough case to proceed. Hearsay evidence should not be allowed under the statutes.

Additionally, it enables an agency to adopt by regulation a different rule, presumably broader, for admission of hearsay evidence. If find this very objectionable and unwise.

Relative to Burden of Proof
This enables an agency to change the Burden of Proof through regulatory action. This is very objectionable to me.

Relative to 11528. In any proceedings under this chapter any agency, agency member, secretary of an agency, hearing reporter, or administrative law judge has power to administer oaths and affirmations and to certify to official acts.

This gives wide authority to too many people to administer oaths and certify acts; to people who may not be "sworn" and even perhaps newly hired clerical staff and is therefore objectionable.

Sincerely,

Robert E. Hughes
360 Wisconsin #202
Long Beach, CA 90814-2248
(310) 630-6390 days
(310) 434-7531 home/evenings

cc
Governor
California Business Roundtable

CSEA California School Employees Association

August 30, 1993

The Honorable Arthur K. Marshall, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: **Administrative Adjudication, Tentative Recommendation**

Dear Judge Marshall and Members of the Commission:

California School Employees Association (CSEA) represents over 170,000 public workers in California, most of whom are classified workers employed in public schools or community college districts. While CSEA[1] occasionally represents workers before state agencies such as the Public Employment Relations Board, the Department of Motor Vehicles, the Unemployment Insurance Appeals Board and the Public Employees Retirement System, most of CSEA's representation is before local agencies.

Early in its deliberations, the Commission decided not to extend coverage under the Administrative Procedure Act (APA) to local agencies, except where existing statutes made it applicable or the agency voluntarily adopted the provisions of the APA. I am unaware of any school or community college district that has voluntarily adopted the provisions of the APA, nor do existing statutes make the APA applicable to these districts except for a few limited situations, none of which involve students, curriculum, or classified workers.

Footnote 21 of the Tentative Recommendation is misleading. While school districts are listed in Government Code section 11501, the application of the APA is "determined by the statues relating to the agency." (Gov. Code § 11501, subd. (a).) School districts were added to Government Code section 11501 in 1961 but, until the statute was repealed and reenacted in 1977 (Stats. 1977, Ch. 122, § 2, p. 558), the statute read: "School districts under section 13443 of the Education Code." (See, e.g., Stats. 1976, Ch. 1185, § 925, p. 5321.) When the Education Code was reorganized in 1977, section 13443 became sections 44949 and 87740, two of the statutes governing the dismissal of certificated workers. No other school district or community college district adjudications are governed by the APA. (See,

[1] This acronym should not be confused with the same acronym for California State Employees Association, a separate and smaller association representing state workers.

2045 Lundy Avenue P.O. Box 640 San Jose, CA 95106 (408) 263-8000 FAX (408) 954-0948

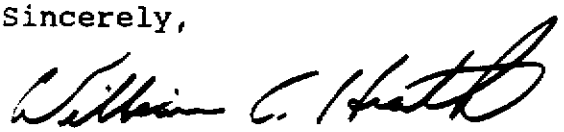
e.g., Ed. Code §§ 48918, 49070, 45113, 45261, 88013 and 88081.) Footnote 21 should be eliminated or revised and the comment to section 612.120 of the new APA should be corrected since Education Code sections 44944 and 44948.5 apply only to school certificated workers.

CSEA supports a comprehensive APA, including (1) mandatory application of the APA to local agencies, (2) a central panel of hearing officers for most formal hearings, (3) less opportunity for agencies to escape the APA by adopting regulations that alter default statutory provisions, and (4) an all-inclusive definition of "adjudication" with provisions for summary proceedings where appropriate. No formal hearing should be permitted without at least internal separation of functions. (Contra, new APA § 643.320 subd. (b).)

While CSEA would be delighted if the Tentative Recommendation were revised to include these provisions, "politics is the art of the possible"[2] and the Commission is not writing on a blank slate. Under these circumstances, CSEA approves the Tentative Recommendation at this time.

The Commission has undertaken a difficult task and done an excellent job of balancing competing interests. Thank you for your efforts.

Sincerely,



WILLIAM C. HEATH
Deputy Chief Counsel

cc: Bud Dougherty, ED
Margie Valdez, CC
Barbara Howard, DGR

[2] Attributed to Otto von Bismarck, (Bartlett's Familiar Quotations (15th ed. 1980) p. 553, note 3.)

State of California

Memorandum

To : California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Date: AUG 31 1993

William R. Attwater
Chief Counsel
OFFICE OF THE CHIEF COUNSEL
From : STATE WATER RESOURCES CONTROL BOARD
901 P Street, Sacramento, CA 95814
Mail Code: G-8

Subject: COMMENTS ON ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

Thank you for this opportunity to comment on the Tentative Recommendation on Administrative Adjudication by State Agencies. The State Water Resources Control Board, while sharing many of the problems common to all administrative agencies, is very different in some ways. Unique to all state agencies is our system of planning and adjudication by our nine Regional Water Quality Control Boards. With review of Regional Water Board matters as well as all rulemaking vested in the State Water Board, this internal, administrative, appellate system occurs nowhere else in state government. Furthermore, the magnitude of our adjudications is unusual. It is rare in the state administrative system to have as many affected and interested parties (sometimes many dozen) as commonly appear in both our water quality and water rights disputes.

Because of the unique nature of our water quality administrative system and the somewhat unusual character of our water rights hearings, most of my comments are focused on ways to blend our needs with the obvious desirability of enhancing statewide consistency in administrative adjudication. While I do not wish to overly burden your task of streamlining the system, we have certain problems which ought to be addressed. I especially appreciate the built-in flexibility which the proposal creates. For the most part, my concerns can be addressed through use of those rules which allow us to establish our own.

In some instances, even though I recognize that the proposal permits agencies to implement regulations modifying the procedures, I would suggest changes for the benefit of all.

Adopting regulations is no picnic and, to the extent it can be avoided, everyone will be better served.

PART 1. GENERAL PROVISIONS.

Chapter 1. Preliminary Provisions.

*Section 610.940. Adoption of Regulations.

The State Water Board supports the inclusion of transitional provisions in the bill. In particular, I support an exemption from Office of Administrative Law (OAL) review of interim regulations. At best, OAL review will only delay the process. At worst, OAL will seek to use its review authority over procedural rulemaking to exercise control over adjudicatory decisions. In fact, OAL has sought to exert control over State Water Board adjudicatory decisions on the pretext that because they are given precedential effect, they are quasi-legislative. I recommend that the proposed APA go farther and exempt all rulemaking pursuant to the adjudicatory provisions of the APA from OAL review.

Even without OAL review, administrative rulemaking procedures are sufficiently cumbersome that agencies are reluctant to engage in rulemaking unless absolutely necessary. Agencies are not likely to adopt rules modifying APA adjudicatory procedures unless they have good reason to do so.

Finally, this provision fails to address the entirely possible situation in which an agency has approved permanent regulations before June 30, 1997 but OAL has rejected them. In such a case, the interim regulations should remain valid until such time as permanent regulations are approved by OAL.

Chapter 2. Application of Division.

*Section 612.150. Contrary Express Statute Controls.

This provision which allows conflicting statutes to prevail over this division is entirely appropriate. The note at the top of page 109 which indicates that an effort will be made to ferret out all conflicting statutes and have them repealed is not. Extra emphasis should be given to allowing agencies to identify special and unique statutes which need to remain on the books. Otherwise, more rulemaking will be necessary to reenact a provision which has been voided by statute.

At this point in time, I would recommend that no provisions of the Porter-Cologne Water Quality Control Act (Water Code, Division 7) be repealed. I would also recommend that all provisions relating to the adjudication of water rights (Water Code, Division 2) be left undisturbed. To the extent that there

are conflicts between those statutes and the proposed APA, I feel that the specific rules in the Water Code better suit our needs.

If your staff concludes that certain sections should be repealed, I would appreciate an opportunity to discuss the matter before legislation is proposed.

*Section 612.160. Suspension of Statute.

This would allow the Governor to suspend the APA if necessary to avoid a denial of funds or services from the federal government. It is unclear whether this section would apply if the operation of the APA merely would delay the receipt of funds or services.

Chapter 3. Procedural Provisions.

*Section 613.110. Voting by Agency Member.

This section differs from the State Water Board's existing requirement that Board members vote in person at a meeting. (Water Code Section 183.) The proposed section would allow voting by mail or otherwise. It appears there is no provision for agency regulations to modify this provision. The State Water Board would prefer the option of keeping its present requirement.

*Section 613.230. Extension of Time.

This adds a five-day period to any service of notice by mail, fax, or electronic delivery. This changes the existing notice requirements which require mailing a minimum number of days before a hearing or a deadline for submitting materials. In expedited proceedings such as temporary urgency changes or permits, or actions to respond to emergency conditions during a drought, this could cause critical delays in taking action. The existing statutory notice requirements should not be disturbed without examining all the effects. The State Water Board would prefer the option of keeping its present requirements.

*Section 613.320. Representation by Attorney.

An agency should be allowed to adopt regulations that impose qualification and disciplinary standards for attorneys, not just for lay representation (§ 613.330). The authority to seek contempt is not sufficient. The agency should have authority to preclude an attorney from practice before the agency in appropriate cases (such as intentional misrepresentations to the agency).

Chapter 4. Conversion of Proceedings.

*Section 614.120. Presiding Officer.

This provides that the hearing officer responsible for a proceeding that is converted to another type of proceeding shall secure the appointment of a successor, for the converted proceeding. This provision leaves out the possibility that it may be more appropriate for the agency head to make this appointment, not the hearing officer. This section should be amended so that the agency head can appoint a successor.

PART 4. ADJUDICATIVE PROCEEDINGS.

Chapter 1. General Provisions.

*Section 641.140. Compilation of Regulations.

Having all agency procedural requirements compiled in one volume of the California Code of Regulations is neither necessary nor desirable. Many procedural requirements relate to exemptions or variances from substantive requirements, and separating the procedural requirements may have the effect of taking them out of context. Moreover, any attorney who looks only at an agency's procedural regulations, and fails to look at the substantive requirements, courts disaster. Separating out the procedural regulations is a trap for the unwary. Finally, it means that many regulations will have to be printed twice, once in the consolidated procedural regulations and once in the agency's own regulations, increasing the cost to subscribers to the Code of Regulations.

*Section 641.210 et seq. Declaratory Decision.

The procedures for declaratory decisions assume that declaratory decisions will be limited to cases where the facts are not disputed, and the agency will decide the applicable law. In water law, this procedure will not often be workable, as decisions will hinge on mixed questions of fact and law. There are, however, cases where it would be very useful for a water right holder to obtain a declaratory decision, and it is feasible to make the necessary factual decisions. The declaratory decisions procedures should allow sufficient flexibility to make factual determinations in appropriate cases.

*Section 641.310. Emergency Decision.

The provisions for emergency decisions are too narrow. Allowance should be also be made for interim relief to prevent irreparable harm pending the outcome of administrative proceedings, especially where those proceedings may take a long

time. Of course, for non-emergency interim relief, the procedures should allow more "process" than in an emergency. The interim relief proceedings should be similar to the proceedings available for a preliminary injunction in court.

It should also be made clear that a statutory emergency triggers this article without resort to regulations.

*Section 641.320. When Emergency Decision Available.

This section allows emergency action based only on public health, safety or welfare reasons. It should include potentially irreparable adverse effects on the environment, particularly to fish and wildlife.

*Section 641.370. Agency Review.

This requires an agency that issues an emergency decision to review it within 15 days and confirm, revoke, or modify it. This is too short a period for notice to other interested parties. Ten days' notice is required for a public meeting and, if five days are added because of Section 613.230, there is no time for preparing a notice after the respondent serves the agency. If a weekend occurs at the end of the 15 days, this period would be even shorter.

Chapter 2. Commencement of Proceeding.

*Section 642.220 et seq. Application for Decision.

It should be recognized that many agencies may have backlogged applications or complaints, simply because of limited resources. The "application for decision" is likely to be used by persons who already have applications or complaints on file and want to jump to the head of the line. The agency apparently would be forced to either initiate an adjudicatory proceeding promptly or make a final decision not to act on the application or complaint. (§ 642.230.) The agency may not have the resources or the legal authority to do either. The statute should expressly allow the agency to decline to act one way or another, while retaining the application or complaint on file, when an application for decision is filed but limited resources prevent immediate attention to the application for decision. The time limits (§ 642.240) are completely unrealistic in view of the limited resources available. The agency needs to be able to set priorities for its work, instead of having its schedule determined by applications for decision. At a minimum, the limit should be changed to 120 days.

*Section 642.310 et seq. Pleadings.

There should be no requirement for a complaint-like initial pleading in cases where the hearing notice provides adequate

notice of the issues to be considered. This is a good example of where the proposed APA is based on the model of occupational licensing, and may not be appropriate for multi-party proceedings such as water right proceedings before the State Water Board. Filing an initial pleading in effect forces an agency into an adversarial role, where it may be more appropriate to act as a kind of referee. In many cases, it is better to reserve judgment until after the parties present their evidence.

*Section 642.430. Venue.

It should always be appropriate for the agency to hold a hearing in its headquarters office.

Chapter 3. Presiding Officer.

*Section 643.110. Designation of Presiding Officer.

The proposed APA would allow hearings to be conducted by the Board, one or more Board members, or an administrative law judge. The Board may hire its own administrative law judges (ALJs), instead of relying on ALJs from the Office of Administrative Hearings. The State Water Board supports these recommendations.

In the State Water Board's experience, it is important to have adjudicatory hearings conducted by the Board itself. Because the outcome often hinges on mixed issues of law and fact (such as what constitutes waste and unreasonable use), reliance on an administrative law judge would be difficult. Reliance on a central panel of administrative law judges, who may not have expertise in water law and many not be in tune with the policy direction of the Board, would be unworkable.

*Section 643.120. OAH Administrative Law Judge as Presiding Officer.

This section says that, absent a statutory exemption, every agency must use an OAH hearing officer. This is contrary to the Commission's general conclusion, stated in the Introduction, "that there should not be a general removal of state agency hearing personnel and functions to a central panel." This statement would lead one to the assumption that most agencies are exempt by statute, yet it is not clear how one determines which agencies are exempt. Does the mere mention of an alternative hearing procedure in the Water Code exempt the State and Regional Water Boards or must we go to the Legislature for more specific language? The basis we have always used, that we were not listed in Government Code § 11501, will cease to exist when it is repealed.

*Section 643.310 et seq. Separation of Functions.

Administrative Agencies should have flexibility, as they do in most other areas, to modify the provisions governing separation of functions. Four areas, in particular, call for greater flexibility.

First there should be greater allowance for flexibility in non-prosecutorial proceedings, such as review of initial applications (as opposed to permit or license revocations). In such cases, staff does not have the initial burden of coming forward. Like the decision-maker, the staff is primarily responsible for reviewing the application. Nevertheless, the separation of functions mandate would require one set of staff to review the application and make its recommendation at the hearing, and a second set of staff to review the application again and review the first set of staff's recommendations in order to make a recommendation to the Board after the hearing. This separation of functions apparently would be required even in cases where there are no closed sessions, and all discussions between Board and staff are made in public. This involves tremendous duplication of effort. Moreover, as noted in California Radioactive Materials v. DHS, 19 Cal.Rptr.2d 357, 369-70 (1993), the APA ordinarily doesn't apply to such proceedings in the first place. Requiring separation of functions in these kinds of proceedings may backfire. Agencies will have the choice of seeking additional money to do the same work they are now doing, or requesting a statutory exemption from the requirement to hold a hearing in the first place. In view of the State's current budget limitations, the more likely result is that the Legislature will repeal existing hearing requirements.

Second, separation of functions should not be required where, because of the participation of other parties, a third party plays an active role in initiating administrative proceedings and putting on proof. In such case, the role of agency staff may be more like that of an adjudicator than that of a prosecutor. In these circumstances, prohibiting staff from advising the decision-maker is neither necessary nor desirable. It's a bit like prohibiting a Superior Court judge from making a ruling because the judge is required to evaluate the parties' criticism of the judge's own tentative decision. What is needed in such multi-party cases are rules making sure that agency staff participating in the proceeding don't lose their impartiality, not a duplicative staff to advise the decision-maker.

Third, separation of functions should not be required in conference hearings. Again, the additional due process provided by separation of functions isn't worth the additional delay and confrontation.

Finally, the rules on ex parte communication with agency staff (§ 643.340) are too restrictive. Often, allowing parties to discuss their contentions with agency staff helps to expedite proceedings before the Board, particularly where lay representation is involved. Allowing agency staff to discuss the issues with the parties, and let them know about applicable statutes or precedents, allows parties to determine which of their arguments are meritorious and avoid discussion of other arguments. What is important is that staff provide equal access to all parties, make clear that arguments or information provided in connection with discussions with one party are available to all parties, and ensure that staff does not become a conduit for ex parte communication with the Board.

Chapter 4. Intervention.

*Section 644.110 et seq. Intervention.

The proposed rules on third-party intervention are more restrictive than those currently applicable to proceedings before the State Water Board. Many parties who now may intervene as a matter of right would instead have to file motions to intervene. At best the procedures are cumbersome; at worst the statute would create confusion as to the status of parties, such as persons who file protests to water right applications, who currently have the rights of intervenors. Curiously, the section on intervention is not one of those which provides flexibility for modification of procedures through administrative rulemaking. The State Water Board would prefer the option of keeping its present procedure.

Chapter 6. Prehearing and Settlement Conferences.

*Section 646.120. Prehearing Conference.

This section should be amended to provide that agency employees other than the presiding officer may conduct prehearing conferences. This is our practice.

*Section 646.210 et seq. Settlement Conference.

The provisions on settlement should authorize modification by administrative rulemaking.

The statement that the parties may settle "on any terms the parties determine are appropriate" is ambiguous, and may be subject to abuse. Some administrative agencies contend that they may take action as part of a settlement which would otherwise be ultra vires. For example, some agencies contend that they may approve a project in violation of the substantive

provisions of applicable statutes if the approval is part of a settlement.

The proposed APA should expressly address the issue of when the agency may deliberate on settlement proposals in closed session. See Funeral Security Plans, Inc. v. State Board of Funeral Directors (3d Dist. Ct. App. 1993) (allowing closed sessions only if litigation is pending or a hearing has been held and no new evidence is considered.) Because settlement may be proposed before a hearing and evaluation of the settlement may require candid assessment of the strengths and weaknesses of the agency's proposed action, the law should make allowance for deliberation in closed session.

Chapter 8. Conduct of Hearing.

*Section 648.510 et seq. Ex Parte Communications.

The provisions on ex parte communications are both too narrow and too inflexible.

There is no reason to treat non-prosecutorial hearings differently from prosecutorial hearings. Some of the worst abuses occur in the context of the hearings on applications, where the applicant develops an insider relationship with decision-makers.

The proposed APA apparently contemplates that ex parte communications will be prohibited only after an "initial pleading" has been filed. This invites abuse. Apparently ex parte communications would be allowed even after an application or third-party complaint has been filed and even though the agency knows a hearing will be required. Allowing ex parte communications on a pending application or impending prosecutorial proceeding, simply because the initial pleading or hearing notice has not yet been filed, makes a sham of the ex parte communications restriction.

On the other hand, the ex parte communications restriction is insufficiently flexible in some respects. Agencies should be allowed to modify applicable requirements through agency rulemaking. The need for flexibility is particularly important for site visits, contacts concerning related projects or proposals for legislation, and briefings by agency staff.

Chapter 9. Decision.

*Section 649.110. Proposed and Final Decisions.

This requires that an agency issue a final decision within 100 days after the case is submitted, unless the agency sets a different time by regulation. The State Water Board clearly

would have to adopt a longer time limit by regulation. Major water right decisions often require at least 180 days before a draft final decision is issued.

*Section 649.120. Form and Contents of Decision.

This requires that a proposed decision state both the factual and legal basis as to each principal controverted issue. While it is generally advisable to include a discussion of the legal bases for a decision, such a discussion is not currently required and may be inadvisable because of the threat of litigation in some instances, or it may be undesirable to the agency because of the space required adequately to explain a legal position.

More importantly, this section could require the State Water Board to explain why it did not take a particular action on an issue. Our current practice is to write findings only to support the specific terms and conditions the Board imposes in a decision, not to explain why the Board did not adopt other terms and conditions or variations on the terms and conditions. With many parties in each hearing, an explanation of each issue that was not addressed in a complex case could result in an extremely long decision with a substantial amount of useless discussion. Water quality orders and water right decisions may exceed 40 pages without adding unnecessary material. With this change the length of decisions could double.

*Section 649.150. Time Proposed Decision Becomes Final.

This would make a proposed decision final without formal State Water Board action at a specific time after it was issued, unless it was adopted earlier. If the Board is exempt from having water right hearings conducted by the Office of Administrative Hearings, it will be able to adopt a regulation specifying the time period. While this section could aid in administrative processing, it removes some agency control over decisions by removing the requirement that decisions be specifically adopted by an affirmative agency action.

*Section 649.210 et seq. Availability and Scope of Review.

It is not clear from this section whether a Regional Water Board, whose decisions now are reviewable by the State Water Board, may review its own decisions.

These procedures partly conflict with the Water Code and State Water Board practice. With respect to a final decision, these procedures would approximately duplicate the Water Code procedures to petition for reconsideration of a water right decision and the Board's informal review of draft decisions. By circulating a draft decision, listening to comments, and

occasionally reopening a hearing to receive additional evidence or argument before adopting a decision, the Board in practice provides for review of proposed decisions.

The procedures in Article 2 of Chapter 9 are more appropriate when the OAH hears a case than when the agency itself hears the case. Section 649.210(b) allows an agency to preclude or limit administrative review, but does not allow the agency to make Article 2 inapplicable. To resolve statutory conflicts, the Board will have to rely on Section 612.150 which provides that a statute expressly applicable to an agency prevails over a contrary provision in the APA.

*Section 649.310 et seq. Precedent Decisions.

The provisions concerning precedent decisions should allow flexibility for revision through agency rulemaking. The State Water Board should be allowed to continue its practice of giving precedential effect to all its decisions, to the same extent a court would (some decisions recognize that they are based on unique circumstances, but still have precedential effect if those circumstances are repeated).

Indexing should not be required (§ 649.330) if decisions are available on a data base which can be searched for key words. The State Water Board maintained an index of key water right decisions, but it was of limited usefulness in finding appropriate water quality orders. The State Water Board discontinued indexing after the orders were added to the Lexis and Westlaw databases. Use of these databases is a much more effective way of searching for appropriate precedent than use of an index system.

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Robert L. Harris
Attorney at Law

August 26, 1993

California Law Revision Commission
4000 Middlefield Rd.
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Re: Comments on Tentative Recommendations --
Administrative Adjudication By State Agencies

Commission Members:

Thank you for this opportunity to comment on your tentative recommendations for the Administrative Adjudication by State Agencies. We commend the Commission for a thorough job; and for the most part, we support the recommended changes to the Administrative Procedure Act (APA). The following comments, however, are submitted for your consideration on those parts we believe should be further revised.

1. SERVICE BY FAX

With today's advancement in technology, accepting electronic filings would, to be sure, save all parties time and resources. We note that proposed APA Sections 613.210; 613.220, and 642.330(c) deal with this issue but only to a limited extent by permitting service by fax for some filings. We suggest that the new APA require agencies that are prepared to accept electronic filings to do so even with initial pleadings.

2. DISCOVERY

In many proceedings the discovery process often becomes a costly endeavor frustrating rather than enhancing the hearing process. Your proposed changes to the discovery rules, providing definite time frames and compulsory disclosure, would greatly improve discovery. However, since Section 645.110(b) would allow some state agencies to modify or make these proposed changes inapplicable to them, the benefits may escape the very agencies whose operations would profit most. With this in mind, we make the following specific comments on the proposed discovery rules.

a. Data Requests - Meaningful discovery requires timely requests and timely responses. We believe the proposed rules specifying times within which parties must not only submit but respond to written discovery requests (§§ 645.210; 645.310) will greatly improve discovery.

b. Subpoenas - Issuing subpoenas should not be routinely allowed as proposed by Section 645.420(a). Parties seeking subpoenas should at least be required to file an affidavit showing good cause along with the subpoena request, and parties should be able to oppose in advance the issuance thereof. While Section 645.430 permits a motion to quash, a showing of good cause would at the time of issuance reduce the necessity of the more expensive motion to quash. Thus, we recommend that Section 645.420 be revised to require at the time of issuance of a subpoena or subpoena duces tecum an affidavit showing good cause for the issuance.

c. Prehearing and Settlement Conferences - We are pleased that the proposed rules would, inter alia, list the matters generally covered at prehearing conferences and allow the use of telephonic prehearing conferences. We do suggest, however, that the presiding officer have authority to accord parties an opportunity to enter into a nondisclosure agreement prior to a settlement conference, in the event they may need more than the evidentiary protection proposed by Section 646.230.

d. Miscellaneous - We think proposed Section 642.210(b) (the continuing duty to disclose matters related to discovery requests); Section 645.130 (deposition of unavailable witnesses), and Sections 645.310 - 645.350 (motions to compel discovery) add immensely to the discovery process.

3. THIRD ROUND PLEADINGS

Far too often third round pleadings become issues in administrative hearings and often there are no rules specifying under what circumstances such pleadings are permitted, if at all. This issue is not addressed by the proposed rules which define only initial pleadings (§610.350) and responsive pleadings (§ 610.672). We suggest the proposed rules address this issue so that the parties will be clear if, and when, such pleadings are allowed.

4. WITHDRAWAL OF PLEADINGS

The proposed rules fail to indicate at what point in the proceedings pleadings may be withdrawn. We believe this issue should be addressed to encourage the withdrawal of pleadings before hearings are held that are meritless.

5. INTERLOCUTORY APPEALS

Frequently, hearing officers are called on to rule on requests to limit, alter, or refocus on-going proceedings. There should be a clear delineation of their roles in this area. Thus, we suggest the Commission promulgate new rules setting forth the procedures for hearing officers to deal effectively in this area of the law.

6. DISMISSAL OF COMPLAINTS AND SUMMARY DISPOSITIONS

The proposed rules do not cover when a defendant may move for dismissal of a complaint for failure to state a cause of action or for other summary dispositions. We believe such rules should be a part of the APA. Moreover, such procedures would help facilitate the early dismissal of meritless actions before resources are wasted defending them.

* * *

Again, we congratulate the Commission for its fine work and hope our comments will prove helpful as the Commission continues its work.

Sincerely,

ROBERT L. HARRIS, ESQ.

RLH:rt

RLH #1 - A:\COMM0826.LET [Administrative Adjudication]

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August 30, 1993

California Law Revision Committee
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Dear Committee:

The following questions and comments are in response to the California Law Revision Committee's proposed replacement of the current California Administrative Procedure Act and refer to the specific sections enumerated.

§613.210. Service

This section refers to service being made to a person or, if that person is a party, to his/her attorney "or authorized representative". I suggest that "authorized representative" be defined ie., letter of representation or other written proof of representation.

§614.110. Conversion authorized

The comment indicates that the courts will have to decide on a case-by case basis what constitutes substantial prejudice in connection with converting a particular agency proceeding. I am not convinced that the conversion procedure will result in swifter resolutions of administrative cases, particularly where a party objects to the conversion on "substantial prejudice" grounds. Once the courts become involved, the administrative process grinds to a halt (unless the court would be reviewing the proceeding for prejudice after it was concluded). It seems that, unless the parties agree to the conversion, the decision to convert would be a difficult one to make.

§614.150. Agency regulations

Regulations regarding conversion would be difficult to draft as it seems that a determination as to whether a person would be prejudiced by conversion needs to be made on a case-by-case basis. Nevertheless, regulations may at least provide some guidance as to when conversion is appropriate.

§642.240. Time for agency action.

Regarding Paragraph (2), it is unclear what is meant by "commence" an adjudicative hearing. Assuming that a full-scale

hearing before OAH is appropriate, does this mean that the adjudicative proceeding must actually begin within 90 days or that a request for a hearing be made by that time. Of course, an agency's ability to bring a case to hearing within 90 days depends not only upon the caseload and availability of agency staff but OAH's own calendar. Should the time limits in §642.320 become effective, this Department would need additional investigators and Compliance attorneys in order to meet those deadlines.

§642.420. Continuances.

The comments to this section indicate that denial of a continuance would be subject to judicial review "at the same time and in the same manner as other disputed matters." For the sake of fairness and expedience, it seems that the decision as to whether to grant a continuance should be fully resolved prior to the start of the administrative hearing. The damage will already have been done if the hearing takes place despite a reasonable request for continuance and the prejudiced party must then bring the matter up on a writ.

§643.230. Procedure for disqualification of presiding officer.

Regarding subdivision (d), I believe that it would be more expedient and less prejudicial to the objecting party to conduct a review of the decision as to whether to disqualify the presiding officer before the administrative proceeding begins.

§645.410. Subpoena authority.

Allowing subpoenas duces tecum to provide documents "at any reasonable time and place" rather than just at the hearing will do much to turn the streamlined administrative process into a more costly civil paper war. The parties' discovery rights under Section 11507.6 (and the proposed §§645.210-645.230) are already quite broad and this additional subpoena power will not promote but will, rather, detract from the orderly, prompt disposition of hearings.

§646.130. Subject of prehearing conference.

Regarding subdivision (i), it is unclear whether a party who has not requested discovery is entitled to receive at the prehearing conference copies of the actual exhibits the other party(ies) plan on using as evidence at the hearing or the party is just entitled to a list(s) of what the other side plans on using. In other words, assuming that a party has not requested discovery, I am uncertain as to what is meant by the Comment that the prehearing conference "is limited to an exchange of information concerning evidence to be offered at the hearing."

§648.310. Burden of proof.

Regarding subdivision (b), the standard of proof for professional licenses is "clear and convincing evidence to a reasonable certainty" (see Ettinger v. Board of Medical Quality Assurance (1982) 135 CA3d853, 185CR 601. In most situations, the standard of proof in administrative cases is a preponderance of the evidence. Skelly v. State Personnel Board(1975) 15 C3d 194, 124 CR 14. The standard of proof for in an administrative proceeding involving an insurance license should be preponderance of the evidence.

§648.330. Oral and written testimony.

In subdivision (c), are the the words "if available" meant to modify the words "original" and "complete text" or just "complete text"? If the former, I suggest that the second sentence should read: "On request and if available, parties shall be given an opportunity to compare the copy with the original and an exerpt with the complete text.". It is also unclear as to what is meant by "available". Does this mean available by subpoena or by more informal means?

§650.130. Probation

In order for the "other party" to receive compensation due to respondent's breach of contract, must the agency specifically allege breach of contract in its pleading?

§Bus. & Prof. Code §494.5. Reinstatement of license or reduction of penalty

Insurance licensees are regulated under the Insurance and not the Business & Professions Code. This section should be included under any revised APA as it is under the current one (Government Code Section 11522).

Please call me if you have any questions or would like to discuss this matter.

Very truly yours,

Risa Salat-Kolm
Senior Staff Counsel
(415)904-5353

cc: Janice Kerr
Patricia Staggs

STATE OF CALIFORNIA
PETE WILSON, *Governor*

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August 31, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendation of May 1993
(Administrative Adjudication by State Agencies)

Dear Commissioners:

The Office of Administrative Law ("OAL") is charged with administering the rulemaking portion of the Administrative Procedure Act ("APA"). See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 431 (good summary of OAL duties); *State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal.App.4th 697, 702 (same).

OAL appreciates the opportunity to take part in the administrative adjudication portion of the APA revision project. OAL looks forward to the phase of the project addressing agency rulemaking. Our long term objective is to make the rulemaking portion of the APA less burdensome for state agencies, while preserving public participation and the benefits of independent legal review of proposed regulations.

SPECIFIC CONCERNS RE TENTATIVE RECOMMENDATION

Introduction, p. 2

Paragraph 2 states that the provisions of the APA relating to "adjudication *and judicial review* have been little changed [since 1945]." (Emphasis added.) This statement needs to be qualified. APA provisions governing judicial review *of rulemaking* (Government Code sections 11350, 11350.3) were thoroughly reviewed in the dramatic 1979 changes to the APA which included the creation of OAL. In addition, a number of significant changes have been made since 1979. The declaratory relief statute, Government Code section 11350, was amended substantively in 1982. Government Code section 11347.5(d), concerning judicial review of OAL's regulatory determinations, was added in 1987. Government Code section 11353 was added in 1992: it specifically

provided for judicial review of OAL decisions concerning water quality control rules of the State Water Resources Control Board.

Proposed sections 610.010 through 610.770

Currently, OAL has the authority to adopt regulations interpreting terms used in its enabling act (the rulemaking portion of the APA). Two examples of such terms are "agency" and "regulation." The Tentative Recommendation seems to be moving in the direction of *removing* OAL's authority to adopt regulations defining key statutory terms. It is also possible that the generic definitions of key rulemaking terms which now appear in sections 610.010 through 610.770, while appropriate for administrative adjudication may not serve as well in the administrative rulemaking context.

There are now two distinct sets of definitional provisions in the APA. One set of definitions governs rulemaking: Government Code section 11342. A second set of definitions governs administrative adjudication: Government Code sections 11370.1, 11500. The plan seems to be to place virtually all definitions in *one* consolidated definitions provision: proposed sections 610.010-610.770.
It is true that the comment to proposed section 600 states:

> "This division, as currently drafted, applies only to the administrative adjudication portion of the Administrative Procedure Act. When the division is expanded to include rulemaking, the *general provisions will be reviewed for applicability.*" (Emphasis added.)

This comment in part addresses the OAL concern that definitions not be adopted which do not fit the rulemaking context. However, OAL continues to have grave reservations about the consolidated definitions concept insofar as the draft envisions enacting definitions which will govern rulemaking law, *but which OAL will not be authorized to interpret, implement or make specific in regulation.* OAL will oppose any legislative proposal which does not preserve OAL's rulemaking authority concerning the rulemaking portion of the APA.

It is unclear what, if any, policy justification exists for suddenly removing OAL's rulemaking authority concerning key statutory terms. OAL is continually called upon the interpret the APA, to determine, for instance, if a

given entity is a "state agency" within the meaning of the statute (i.e., if the entity must comply with APA rulemaking requirements).

Proposed section 641.430(b)

This subdivision provides that an administrative law judge employed by the Office of Administrative Hearings shall have been admitted to practice law in this state for at least five years immediately preceding the appointment "and shall possess *any additional qualifications established by the State Personnel Board* for the particular class of position involved." (Emphasis added.)

OAL suggests adding the words "in regulation" following the word "established." Additional qualifications for ALJ's should be established only after an opportunity for meaningful public participation and in a way that creates a full record that will facilitate effective judicial review. At present, the State Personnel Board takes the position that its power to create civil service classifications, granted by the California Constitution, is *not* subject to APA rulemaking requirements. Cf. *Armistead v. State Personnel Board* (1978) 22 Cal.3d 204; *Conroy v. Wolff* (1950) 34 Cal.2d 745; *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47. This exemption issue has been raised by a request for determination filed under Government Code section 11347.5, which is currently pending before OAL (docket no. 90-020), and which may result in litigation.

Proposed section 649.320 (Comment, paragraph 2)

We cannot agree that the first sentence of comment paragraph 2 accurately reflects the current state of the law. See Ogden, *California Public Agency Practice*, sec. 20.06[4]. Government Code section 11346 clearly provides that all quasi-legislative enactments of state agencies are subject to the minimum procedural requirements of the APA unless *expressly* exempted by statute. We have not located any presently effective statute which generally exempts all precedent decisions of all agencies from the APA. Cf. Government Code section 19582.5 (Personnel Board).

Also, OAL suggests modifying the second sentence of comment paragraph 2. We suggest a revision along these lines: "Agencies should, to the extent practicable, periodically review existing precedent decisions with an eye toward

including the rules thus established in proposed amendments to statutes or regulations." There are two reasons for this suggestion. First, it is much easier for lawyers (not to mention non-lawyers!) to locate the pertinent law if it is codified in statute or regulation. Precedent decision systems can be complex and time-consuming to learn and use. This can in effect limit practice in given legal areas to a small number of specialists. Second, many state agencies propose one or more pieces of legislation each year. Many agencies adopt one or more sets of regulations each year. In the process of deciding what to include in these proposals, it would be good practice to routinely review those uncodified general rules contained in precedent decisions.

Proposed section 641.480, comment (p. 111)

Why does the comment cite section 610.190?

Conclusion

Finally, OAL appreciates this and prior opportunities to offer comments on the proposed new administrative adjudication statute. However, we reserve our right to comment further on this proposal, both before the Commission and in subsequent legislative proceedings. We need to see the final product. We remain concerned about how provisions in the administrative adjudication statute will impact the rulemaking statute. Though the two areas are in theory separate and distinct, a number of administrative adjudication provisions profoundly impact the rulemaking statute: e.g., the new APA exemption for precedent decisions.

Sincerely,

Herbert F. Bolz

STATE OF CALIFORNIA PETE WILSON, *Governor*

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
1001 Sixth Street, Suite 401
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August 31, 1993

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Subject: Tentative Recommendation dated May 1993, "Administrative Adjudication by State Agencies"

Dear Mr. Sterling:

We assume that the "new" Administrative Procedure Act will continue to cover the Department of Alcoholic Beverage Control but not the Alcoholic Beverage Control Appeals Board. If there is any doubt concerning this point, I would be happy to discuss the subject further. In any event, I do have a couple of comments to make concerning the draft, as follows:

EVIDENCE

Page 27, lines 10-12

Question: Is there a need to explain whether or not the "other" evidence must be at least a "cut above" the type of hearsay evidence that may not be sufficient in itself?

BURDEN OF PROOF

Page 27, fifth line from bottom

Question: Is "occupational license" defined anywhere?

Comment: It is my understanding that an ABC Act license may presently be granted to an applicant who is illiterate and who is without formal education. In decisions by the ABC Appeals Board,

the latter has ruled that ABC Act cases have the preponderance of the evidence standard rather than clear and convincing evidence.

I would be happy to discuss any of these points by telephone with a member of your staff.

Sincerely,

WILLIAM B. ELEY
Chief Counsel & Executive Officer
(916) 445-4005

State of California

Memorandum

STATE PERSONNEL BOARD COMMENTS

Date: August 31, 1993

To : California Law Revision Commission

From: **ELISE S. ROSE**, Chief Counsel
State Personnel Board

Re: Administrative Adjudication by State Agencies
Comments on Tentative Recommendation

The Tentative Recommendation has been reviewed by State Personnel Board (SPB or Board) staff to determine which proposed provisions are different than or conflict with existing laws and rules.

The SPB is a constitutional agency, charged with enforcing and administering the civil service statutes, prescribing probationary periods and classifications, and reviewing disciplinary actions. (California Constitution, Article VII, sec. 3).[1]

The civil service statutes are contained within the Government Code, Title 2, Division 5, Part 1 (General) (commencing with Government Code, section 18000) and Part 2 (State Civil Service) (commencing with Government Code, section 18500).[2]

The SPB also has constitutional authority to adopt rules authorized by statute. The rules so adopted are contained within Title 2, California Code of Regulations, Chapter 1.[3]

The California Law Revision Commission has inquired as to whether the procedures unique to the SPB should be retained based on the special nature of SPB hearings.

What follows are some general comments on the introductory materials submitted with the proposed statutes. The balance of this document contains a brief summary of the various stages of the

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[1]Since the SPB is a constitutional agency, it is at least arguable that the SPB should continue to be exempt from the Administrative Procedures Act.

[2]All references to statutes are to the Government Code, unless otherwise noted.

[3]All references to rules are to those contained in Title 2 of the California Code of Regulations, unless otherwise noted.

SPB disciplinary appeals process[4] as it now exists with citations to applicable laws and rules. Comments on conflicts between the proposed recommendations and current procedures appear in bold. In many instances, the differences between current and proposed law are merely noted as more time is necessary to evaluate the potential impact of the changes on current operations.

GENERAL COMMENTS ON INTRODUCTION

p.2 Statement that the State Personnel Board (SPB) is "wholly uncovered" by the current Administrative Procedure Act (APA) is erroneous. Government Code section 19578[5] specifically incorporates section 11513 procedures into SPB administrative hearings.

p.4, 12 Modification(s) to model APA only by regulations adopted under APA rulemaking procedures. Arguably, current SPB regulations would be covered as authorized modifications. In addition, proposed section 612.150 states that a statute "expressly applicable to a particular agency prevails" over a different model APA provision. Thus, unless expressly repealed, sections 18570-18577, 18650-18683, 19570-19593, 19630-19635, 19700-19706 would arguably remain intact, notwithstanding contrary provisions in the model APA.

p.4 Effective date of model APA deferred one year to 1/1/96 to allow for regulations. Too short a period to comply with all notice, comment and response requirements under APA rulemaking procedures, given the numerous and diverse SPB constituents.

p.5 Statement that the most important elements of agency's procedural code are unwritten is not particularly applicable to SPB administrative adjudications. Numerous statutes (those cited above, i.e.) and regulations (tit. 2, Cal. Code Regs., secs. 31-37, 51-74, i.e.) already govern SPB procedures.

p.6 Statement that current system limits precedential decisions to the issuing agency. This procedure is completely appropriate, especially since the burden of proof may differ with the

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[4]The SPB also uses the adjudicatory hearing process to hear, inter alia, some discrimination complaints (Section 19702), medical appeals (Section 19253.5), and appeals from rejection during probationary period (Section 19173) and non-punitive terminations (Section 18585). Since the disciplinary appeals are by far the largest group of cases to go to adjudicatory hearing, and since all adjudicatory hearings before the SPB follow the same procedures, this memorandum refers to those appeals only.

[5]All references will be to the Government Code unless otherwise noted.

It is a continual challenge to keep current on one's own agency precedents and judicial decisions. It would be nearly impossible to keep informed of, much less be bound by, other agency precedents.

p.9 No central panel for administrative law judges (ALJ). Agreement with this approach to promote experience and expertise with particular agency precedents and operations.

p.22 SPB is interested in exploring the possible use of mediation as an alternative dispute resolution technique and would be interested in tracking the development by the Office of Administrative Hearings of model regulations for alternative dispute resolution proceedings.

IMPACT OF PROPOSED STATUTORY CHANGES ON CURRENT SPB LAWS AND RULES

INITIATION OF THE PROCESS

The SPB disciplinary process is initiated with the appointing power by serving a notice of adverse (disciplinary) action upon the affected employee and filing that notice with the SPB within 15 days of its effective date. (Section 19574). Further very specific requirements regarding the notice and service thereof are set forth in Rule 52.3 as well as in case law. [See Skelly v. State Personnel Board (1979) 15 Cal.3d 194.]

The proposed provisions on parties and pleadings are confusing to apply in the SPB disciplinary context (see sections 610.670, 610.672). While the appointing party (department or agency or respondent in SPB terms) files the notice of adverse action, the party actually initiating the adjudicatory proceeding before the SPB is the employee being disciplined (appellant). Terms should be clarified to encompass SPB process and avoid confusion that would result from changing terminology after more than 40 years of history.

More importantly, current due process requirements as established by statute, rule and case law as set forth above are not incorporated into the new law. (eg. service of papers upon which action is based, Skelly procedures, time requirements for service of adverse action.) The SPB would seek to retain its law pursuant to section 642.110.

The employee may within 20 days after service file with the SPB a "written answer" to the notice. (Section 19575). Notably, the courts have not construed this time frame as jurisdictional--late filings, where delay is short and for good cause, and where no prejudice is shown must be accepted. (Gonzales v. SPB). Whenever an answer is filed to an adverse action, the SPB shall within a reasonable time, set a hearing. (Section 19578). Although "reasonable time" is not further defined in this portion of the

statute, the general time provisions for all investigations and hearings may apply in which case the matter must be heard and decided in the shorter of six months from the time of the appeal or 90 days from the date of submission, whichever is less. (Section 18671.1).

Section 642.240 sets the time for commencing a hearing as 90 days from the date the appeal is filed or from the date the agency receives any further information it has requested regarding the appeal. Thus, the TR is in direct conflict with the time frames set forth in SPB law.

POST NOTICE, PRE-HEARING MATTERS

Continuances

Section 19579 and Rule 52.5 govern continuances of SPB hearings. An SPB hearing may be continued by mutual agreement or upon a showing of good cause. When acts or omissions that lead to an adverse action are also the subject of criminal proceedings, continuances shall be granted when parties mutually concur to allow for completion of criminal proceedings.

Proposed section 642.420 provides for a continuance only for good cause and sets out a procedure for requesting a continuance. The SPB may seek to preserve its unique statute and rule which deals with the criminal proceedings and allows for continuances upon mutual agreement of the parties.

Venue

The SPB has no venue provisions.

The venue provisions proposed in section 642.430 do not make practical sense for SPB hearings which are often held at prisons and other facilities located in remote areas. The appointing powers would strongly oppose centralization of hearings, especially when inmates, wards or patients are witnesses. The SPB may seek to be exempt from the venue provisions.

Bias

Currently, the SPB has no provisions regarding bias.

Concern regarding proposal (section 643.210-230) on peremptory challenges given small number of ALJS.

Discovery

Sections 19574.1 and 19574.2 govern discovery in SPB proceedings. Section 19574.1 provides the employee with the right to interview other employees having knowledge of the acts or omissions upon which the adverse action was based, and provides the appointing power with the duty to assure the cooperation of employees interviewed. Discovery motions are filed with the ALJ, and motions to compel are made to the superior court.

The SPB has not yet determined whether to opt out of Chapter 5 pursuant to 645.110 (b).

Subpoenas and Depositions

Sections 18671-18674, 18676 and 19581 govern SPB subpoena power, depositions, and witness fees. Currently, the ALJ has subpoena power and may require depositions of witnesses to be taken in the same manner as depositions are taken in civil cases in superior court. Subpoena power is limited to 100 miles unless party shows by affidavit that witness is material. Depositions may be taken of infirm witnesses, witnesses outside scope of subpoena power, or witnesses who will be unavailable for hearing. Witness fees are same as in civil proceedings. Special fee procedures apply to witnesses subpoenaed by state agency.

The SPB has not yet determined whether to opt out of Chapter 5 pursuant to 645.110(b). Fact that subpoena authority extended only to attorneys for parties would disadvantage non-attorney representatives who often appear in SPB hearings.

Prehearing and Settlement Conferences

Section 19581.5 governs in SPB proceedings and provides only that the board may require or any party may request such a conference. The ALJ who conducts such a conference may not preside over subsequent proceedings without consent of both parties.

The SPB has not yet determined whether to opt out of Chapter 6 pursuant to section 646.110. In practice, such conferences are rarely held.

Settlements

Section 18681 governs settlements before the SPB.

That section should be preserved pursuant to proposed 646.210 (b). The SPB need authority to review settlement agreements to assure the integrity of the civil service system is not compromised.

Hearing Alternatives

Section 19576 allows the SPB to conduct an "investigation" in lieu of hearing under certain specified circumstances and for specified minor disciplinary actions. The disciplinary actions considered of a minor nature under section 19576 include actions other than those specified in 647.110 (b)(4). Even so, a memorandum of understanding may supersede the SPB statute. Currently, the SPB is not relying on the statute to deny an adjudicatory hearing in any disciplinary cases.

Section 647.110(b)(4) should be amended to be consistent with section 19576.

CONDUCT OF HEARING

The SPB has not yet determined whether to opt out of Chapter 8 pursuant to section 648.110. Currently, however,
Section 19578 provides that the hearing is to be conducted in accordance with the provisions of **Section 11513**, except that witnesses may be examined under section 19580 (refers to examination by deposition or at hearing (under Evidence Code, section 776).

Default

Section 19579 provides that failure of either party to proceed at hearing shall be deemed a withdrawal of the action or appeal absent a continuance.

Proposed section 648.130 provides a much more detailed provision setting forth conditions under which a default occurs, effect of default, and procedures for setting aside default.

Open Hearings

SPB Rule 51.4 provides specifically that hearings are public. Rule 52.1 provides for the exclusion of witnesses.

Proposed rule 648.140, from which exemptions under 648.110 will not be granted, does not address the exclusion of witnesses rule, unless subdivision (2) could be construed to allow the exclusion of witnesses where credibility is an issue.

Evidence

Section 19578 currently makes provisions of section 11513 applicable.

DECISION

Issuance of Decision

Current law provides that the SPB board shall render a decision within a reasonable time after hearing. (Section 19583). While "reasonable time" is not defined in section 19583, section 18671.1 more specifically provides the time frames for processing SPB appeals. Section 18671.1 provides that "the period from the filing of the petition to the decision of the board shall not exceed six months or 90 days from the time of submission, whichever time period is less, except that the board may extend the six-month period up to 45 days."

Generally, after the case is submitted the ALJ renders a proposed decision. The contents of the SPB decision are also specified by statute. [Section 19582(d)]. **Section 649.120 provides more detail as to the contents of the decision than does current SPB law.**

The proposed decision is transmitted to the Board for review. There is no specified time frame for transmission so long as the time frames of section 18671.1 are met. As a practical matter, the decision is transmitted to a hearing office which packages the decision, along with approximately 35-45 other decisions, for submission to the Board at its next Board meeting. (Board meetings are held twice a month).

Section 649.110(b) provides that the presiding officer shall deliver the decision to the agency head within 30 days of submission. The cases before SPB ALJs are often lengthy, sometimes consuming several days of hearing. As noted above, Section 18671.1 gives the Board 90 days from the date of submission to issue a decision. It would also be difficult for the proposed decisions to be prepared for submission to the Board in such a short time frame. The SPB will probably opt out of the timeframes imposed in the proposed statute, as authorized.

The proposed decision becomes public record and must be served on the parties within 10 days after it is filed with the Board whether or not the Board has acted on the decision. **Section 649.130 provides a proposed decision becomes public within 30 days after delivery to the agency head.**

Based upon a review of the decision only, the Board may adopt the proposed decision, modify the penalty downward and adopt the balance of the decision, reject the decision, or remand the case to an ALJ for further findings of fact. (Section 19582).

Section 649.140 provides that an agency has 100 days (a different time may be specified by SPB) to either adopt the decision as a final decision, adopt with technical changes or reduce the penalty and adopt the balance of the proposed decision. The options of

reject, remand and rehear are available under a separate administrative review procedure. (See section 649.210).

If the Board adopts in full or modifies the penalty and adopts the balance of the proposed decision, the decision is issued by serving a copy of the decision on the parties. (Section 19582). If no petition for rehearing is filed (Section 19586), the decision becomes final 30 days after service on the parties.

Section 649.150 implies a decision becomes final immediately upon its adoption. (But see section 649.160 re effective date) Applying this statute to SPB's petition for rehearing process (statute refers to administrative review), section 649.150 appears to provide the decision would become final on denial of petition for rehearing. Finality is automatic 100 days after submission to the Board, but SPB could change this time frame by regulation.

Section 649.160 provides 10 day time limit within which copy of final decision must be served on parties. Also provides decision must state its effective date and time within which judicial review may be initiated. Failure to state time within which judicial review may be initiated extends time to six months after service of decision. (Query-- does this mean decision becomes final 6 months after service of decision? Petitions for writ of administrative mandamus may be filed up to 1 year after decision becomes final.)

Administrative Review Procedure

There are two situations in which the Board will decide the case itself on the record and issue its own decision. The first situation arises when the Board initially rejects the proposed decision of the ALJ, orders the transcript prepared, asks the parties to brief particular issues, and issues its own written decision after first affording the parties the opportunity to present oral and written arguments. [Section 19582(c)].

The second situation in which the Board decides the case itself is where one of the parties has petitioned for rehearing within 30 days after the Board has adopted a proposed decision of an ALJ. In such a case, the Board serves the petition for rehearing on the non-petitioning party. The Board has 60 days after a petition for rehearing is served upon all parties to grant or deny the petition for rehearing based upon briefs filed by the parties. (Section 19586).

If the petition for rehearing is granted, the Board may remand the case to an ALJ or decide to hear the case itself. If the Board is hearing the case, the transcript is prepared and the parties may further brief the issues and may offer oral argument. As in the case of a rejection, the Board issues its own decision. There is no time limit within which the Board must issue its own decision. (Section 19587).

The proposed administrative review procedure is somewhat unclear. The agency head may initiate administrative review of a proposed or final decision on its own motion or a party may do so "on service of a copy of the decision but not later than the effective date". Does this mean the initiation of the review procedure occurs after the decision has already been adopted under section 649.140? Since the SPB board reviews all proposed decisions of the ALJ, this article would seem to apply only when the Board rejects a proposed decision of an ALJ or when a party files a petition for rehearing after the Board has adopted a proposed decision. The provisions of section 649.210 would not appear to apply to the Board since the Board has a constitutional mandate to review all disciplinary actions and the procedure appears to assume review is only an option and that delegation of review is proper. (see also Comment to section 649.210)

Sections 649.220 (Initiation of review) and 649.230 (Review procedure) appear to be fairly consistent with the petition for rehearing and rejection processes employed by the Board. What is unclear is whether the agency head first either grants or denies the petition for rehearing and then, if the petition has been granted, reviews the case, or whether the agency head does not even act on the petition for rehearing until the record has been prepared and the issues briefed and argued. The SPB process which occurs in two separate steps [(1) grant or deny petition for rehearing based on briefs only; (2) if petition granted, prepare record, accept oral arguments and further briefs, issue decision] appears clearer and cleaner.

Section 649.240 provides that within 100 days after presentation of briefs and arguments, or other time provided by agency regulation, the reviewing authority must take action. The actions available are issue a final decision, remand the matter, or reject the decision without remand (in the SPB proceeding the decision is rejected and the case remanded or retained for Board review upon the granting of the petition for rehearing process.)

Precedent Decisions

Section 19582.5 provides that the SPB may designate certain of its decisions as precedents, shall publish its precedential decisions, and may adopt rules for the adoption of previously issued decisions as precedents. The Board has been issuing precedential decisions for almost two years and they are being published by Continuing Education for the Bar. The Board has not adopted rules for the adoption of previously issued decisions as precedents.

The proposed statutes (sections 649.310 - 649.340) would change the current practice in that SPB would be authorized to designate a part of a decision as precedential. The SPB would, however, be limited to issuing a decision as precedential only if it contained a significant legal or policy determination of general application

that is likely to recur. The index would be required to be publicized in the California Regulatory Notice Register. The proposed statutes contain no authorization for adopting rules for the adoption of previously issued decisions as precedents.

Implementation of Decision

Currently the SPB does not have any law pertaining to effective date of decision. The current law does not specify whether the decision becomes effective upon its adoption or upon it becoming final.

The proposed law would delay the effective date until 30 days after it becomes final absent other direction from agency head.

If you have any further questions, please call Chris Bologna, Chief Administrative Law Judge at (916) 653-0544 or me at (916) 653-1403, TDD (916) 653-1498.

STATE OF CALIFORNIA—THE RESOURCES AGENCY PETE WILSON, *Governor*

CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET
SACRAMENTO, CA 95814-5512

August 30, 1993

File:
Key:

Nathaniel Sterling, Executive Director
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Dear Mr. Sterling:

Enclosed are the comments of the California Energy Commission regarding the Law Revision Commission's tentative recommendation on administrative adjudication. As the enclosed comments indicate, I believe the Law Revision Commission has made an impressive effort to develop an adjudicative statute that could apply to all the state's adjudicative proceedings, and not just prosecutorial ones. I hope you will use these comments to make the proposal even more adaptable to the needs of the non-prosecutorial agencies such as the Energy Commission and the Public Utilities Commission. I look forward to working cooperatively with the Law Revision Commission in the future on this proposal.

Sincerely,

William M. Chamberlain

WILLIAM M. CHAMBERLAIN
Chief Counsel

COMMENTS OF THE CALIFORNIA ENERGY COMMISSION
ON THE LAW REVISION COMMISSION'S PROPOSED
AMENDMENTS TO THE ADMINISTRATIVE PROCEDURE ACT

I. THE WARREN-ALQUIST ACT: DUE PROCESS BEFORE THE CALIFORNIA ENERGY COMMISSION

The California Energy Commission ("CEC") was created in 1974 in the midst of an energy crisis that caused many to realize that shortages of electricity would have a devastating effect on the state's economy and environment. To avoid such effects, the Legislature established (1) a state role in forecasting electricity need (Pub. Resources Code §§ 25300 et seq.), (2) programs to bring about more efficient use of electricity and natural gas (Pub. Resources Code §§ 25400 et seq.), (3) programs to advance the development of new sources of energy (Pub. Resources Code §§ 25600 et seq.), and (4) a unique licensing process for major thermal powerplants and the transmission lines needed to serve them (Pub. Resources Code §§ 25500 et seq.). The Legislature also created the CEC as a multi-member collegial body in order to tap the combined expertise of several disciplines in the creation and implementation of sensitive energy policies. (Pub. Resources Code § 25201).

The CEC's power facility licensing process is a quasi-adjudicatory process that will be affected by the new proposed Administrative Procedure Act ("APA"). It is a unique and important process, however, whose purposes must be carefully considered as these changes in the APA are developed. For example, unlike any other quasi-adjudicatory process, the CEC's powerplant siting process was designed to be a "one-stop" permit forum that would ensure both timely decisions on needed electricity facilities and increased access by the public to the decisionmaking process. The CEC's approval of a major powerplant preempts all other state and local permit requirements (Pub. Resources Code § 25500) while at the same time ensuring, in all but the most extreme cases of need for a project, that all state and local laws, standards, and other requirements are met. (Pub. Resources Code § 25523). Once the CEC makes its decision, in order to avoid lengthy delays from multi-level judicial review of CEC decisions to license power facilities, the Legislature provided that these decisions would be reviewed in the same manner as decisions of the Public Utilities Commission on certificates of public convenience and necessity, thus prescribing direct review in the California Supreme Court. (Pub. Resources Code § 25531). All of these unique features respond to the concern that needed power facilities might be delayed with disastrous consequences.

In addition to concern that needed power facilities might be delayed in multi-layered permit processes, the Legislature in 1974 also knew that the public was becoming increasingly concerned that some powerplants were being licensed without adequate safeguards to

public safety and the environment. The Legislature therefore created the CEC's licensing process as an open public process, designed to give the interested public a full and fair opportunity to be involved in power facility licensing cases that affect them. For very large powerplants, applicants are required to submit three alternative sites and the CEC is required to conduct "informational hearings" near each site to provide the public the information it needs to determine if the proposed facility is objectionable. (Pub. Resources Code §§ 25503, 25509). In addition, public hearings are required for every powerplant, and the location of the hearings must accommodate the public as much as is reasonably possible. (Pub. Resources Code § 25521). Moreover, all public hearings before the CEC are required to be open to the public and each member of the public who wishes to be heard must be given a reasonable opportunity to speak. (Pub. Resources Code § 25214). Finally, to emphasize the importance of the full opportunity for public participation in these powerplant licensing proceedings, the Legislature established a special office of "Public Advisor," appointed by the Governor, in order to ensure that the public has assistance in understanding the Commission's procedures and the technical aspects of power facility licensing proceedings. (Pub. Resources Code §§ 25217.1, 25222).

It is only through this extraordinary care and attention to the needs of the public for an open and accessible process that the Legislature could hope to achieve CEC licensing decisions that would appropriately balance competing interests thus resulting in decisions that would withstand public criticism and deserve abbreviated judicial review. Thus the CEC has taken very seriously, as it has adopted regulations providing further detail for its siting process, the need to create a very open process that is fair to all participants. For example, in the first year of its existence, the CEC adopted an ex parte rule that prohibits contact between parties (including CEC staff) and members of the Commission or their advisors with respect to substantive issues in a case. (Cal. Code Regs., tit. 20, § 1216). The CEC has also fashioned a process in which two members of the CEC are assigned to each case as a "committee" and at least one of them is personally present at all evidentiary hearings. The commissioners are assisted by hearing officers, but the responsibility for the hearings, for rulings on motions, and for the resulting proposed decision that will be considered by the full commission, belongs to the presiding member of the committee. The CEC staff acts as an independent party in these proceedings in order to ensure a thorough review of every powerplant proposal whether there are intervenors or not, and separation of function between staff and decisionmaker is carefully observed.

While these basic tenets of due process and fairness are maintained in the CEC's process, many of the more formal aspects of administrative hearings that are prosecutorial in nature are often not adhered to in CEC hearings. Because the CEC's proceedings deal

with very technical material, efforts are made to keep the hearings as informal as possible in order to increase public accessibility. Witnesses are subject to cross-examination, but their direct testimony is provided in writing. Discovery tends to be fairly informal, emphasizing data requests and workshops rather than formal depositions. Intervention is rarely denied and may even be permitted at a late stage in the proceeding if it can be accommodated within the statutorily mandated schedule of the proceeding. Proceedings in which multiple intervenors participate are not unusual at the CEC.

The success of the CEC's power facility licensing process attests to the wisdom of the Legislature in establishing this unique adjudication structure. In the 18 years in which this process has existed, the CEC has provided timely licensing for several dozen powerplants and associated transmission facilities without a single day of construction delay resulting from judicial review of any CEC power facility licensing decision. At the same time, public participation in decisions regarding where and under what conditions to allow these essential infrastructure improvements to be developed has been substantially increased in comparison to what typically existed before the creation of the CEC and in comparison to current opportunities for public participation in local licensing proceedings for other kinds of projects. The CEC's process could not possibly be emulated in most quasi-adjudicatory settings, but it works very well for the special purpose for which it was created. The CEC hopes that the Law Revision Commission will be sensitive to the need to retain the effectiveness of this unique process as it proceeds to amend the APA.

II. GENERAL COMMENTS ON THE PROPOSED NEW ADMINISTRATIVE PROCEDURE ACT

The CEC has carefully monitored the Law Revision Commission's work as it has developed the new proposed APA because these revisions could potentially disturb the CEC's power facility licensing process. The CEC recognizes the importance of this project and appreciates the Law Revision Commission's desire to develop, to the maximum extent feasible, a uniform procedure for administrative adjudication. This is a formidable task because such a procedure must try to encompass many very different kinds of decision processes. Moreover, when the state conducts literally thousands of hearings that uniformly involve only two parties, that are prosecutorial in nature, that are often handled at the evidentiary stage by a hearing officer, and that tend to involve straight-forward factual questions rather than complex technical and economic questions requiring expert opinion testimony, it is natural for the proposed APA to fit this mold. By contrast, the state only conducts a few power facility licensing proceedings each year. These are characterized by multiple parties, many of whom

are not represented by counsel, they are not prosecutorial in nature, they are considered important enough that they must be presided over by appointees of the Governor, and they involve highly technical issues and seldom involve disputes about past events. It is difficult for an APA designed to meet the needs of the first type of proceedings to perform as well in the second. In the past, the Legislature has accommodated these differences by merely excepting the CEC's power facility decisions from the APA. The question today is whether such an exception should continue or whether the desire for a uniform APA can be achieved without undue harm to the successful CEC licensing process.

Our first reaction to the project was, frankly, that it was an impossible task to develop an APA that could serve the needs of professional licensing agencies in prosecutorial proceedings while also accommodating the very special needs of the CEC's power facility licensing process. We assumed that it would be necessary to request an exception for that process even though other CEC adjudications could readily conform to the new APA. However, we have been impressed with the efforts of the Law Revision Commission, its staff, and its consultant to provide adequate flexibility in the new APA that special kinds of adjudicatory proceedings might be accommodated through changes that could be made by regulation. We are continuing to study the proposal and reserve the right to decide ultimately that an exception is still the most appropriate course when your final version is released in bill form, but it currently appears that with a few additional changes to accommodated some of the more unique aspects of our process, an exception may not be necessary. We congratulate the Commission for the substantial progress that has been made toward its goal of a workable uniform APA. The specific comments provided below detail some of these additional changes that we hope you will consider.

III. SECTION-BY-SECTION COMMENTS ON THE MAY 1993 DRAFT

Section 610.460. Party. The definition of "party" states that it "includes the agency that is taking the action, ..." In adjudicatory proceedings before the CEC (and the Public Utilities Commission as well as other boards and commissions) the agency staff is the party, while the commission is the decision-maker (or "agency head"). To make it entirely clear that the "party" to such a proceeding is the staff, the phrase "or agency staff" should be inserted after "agency" in the first line of the section.

Section 612.150. Contrary Express Statute Controls. This section states that "a statute expressly applicable to a particular agency prevails over a contrary provision of this division." This leaves unclear whether an applicable statute, such as the California Environmental Quality Act ("CEQA"), would be controlling

to the extent it conflicted with the APA regarding, for example, the applicable statute of limitations. In other words, would a generic statute that an agency must comply with, but which is not expressly applicable to a particular agency, control over provisions of the APA? This issue will be even more important if local agencies adopt the new APA regulations for utilization on applications that are subject to CEQA.

Section 641.220. Declaratory Decision Permissive. The first sentence of this section states that "a person may apply to an agency for a declaratory decision as to the applicability to specified circumstances of a statute, regulation, or decision within the primary jurisdiction of the agency." (Emphasis added.) For the CEC, the declaratory decision would probably be most useful for determining whether (or to what extent) a proposed power plant project is within the CEC's jurisdiction. The language should be amended to clarify that issues of agency jurisdiction are appropriate for declaratory decisions.

Section 641.370. Agency Review. This section requires the agency, upon petition by the respondent, to "not later than 15 days . . . . review and confirm, revoke, or modify an emergency decision . . . ." Boards and commissions such as the CEC must conduct their business in publicly noticed business meetings, which under the Open Meetings Act require a minimum 10-day notice. In reality, many such agencies, including the CEC, try to have their business meeting agendas mailed to interested persons at least two weeks before the meeting. Agency action within 15 days on the petition is thus infeasible for boards and commissions. The section should be amended to state that, where the "agency head" is a multi-member body, action on the petition is required within 30 days.

Section 641.380. Judicial Review. Subdivision (c)(1) requires judicial review of any agency emergency decision on the petition within 15 days after service of the petition on the agency. As stated above, multi-member boards and commissions require more time to act on petitions. In addition, if the agency has 15 days to act, and does act on the 15th day, it would be almost impossible for the court to conduct its review on the same day. A somewhat longer time period is needed if the court's time limitation is to be feasible.

Section 642.210. Initiation by Agency. Agency's like the CEC must frequently initiate actions to determine whether a project is subject to their jurisdiction. Although it is well-established California law that agencies are authorized to determine their jurisdiction in the first instance, this section should restate that principle with the following additional language:

> An agency may initiate an adjudicative proceeding with respect to a matter within the agency's jurisdiction, or to determine the agency's jurisdiction.

Section 642.240. Time for Agency Action. This section allows agencies to vary time limits set forth in the section by adopting regulations. This is a good provision in that it helps agencies like the CEC conform its process to the new APA requirements.

Section 643.310. When Separation Required. The comment to this section states that "[w]hile subdivision (a) precludes an adversary [party] from assisting or advising a presiding officer, it does not preclude a presiding officer from assisting or advising an adversary," and goes on to say that it would allow an agency head to communicate to an adversary (party) that a particular case should be settled or dismissed. While we recognize the efficiency of such a procedure in the context of two-party hearings, it is more problematic in multi-party hearings such as those that occur at the CEC. The basic fairness of the process may be called into question by the public if decisionmakers in proceedings involving controversial issues of public policy begin to advise some parties but not others. Moreover, an ex parte communication will seldom be a one way conversation. A decisionmaker's suggestion to settle an issue will often elicit at least a question whether the decisionmaker is aware of some key fact, and a discussion of the evidence, some of which may not be on the record, is likely to follow. For these reasons, the CEC commissioners would be routinely advised to avoid initiating comments to parties that would violate our ex parte rule. We suggest that the comment to this section be expanded to include these considerations so that the basic purposes of the new APA ex parte rule are not inadvertently undermined by encouraging decisionmakers to freely become involved in counseling adversaries who appear before them.

Section 644.110. Intervention. This section sets the requirements that a motion to intervene in a proceeding must meet for the motion to be granted. Subdivision (b) requires that the motion be made in advance of any prehearing conference. While motions to intervene should be made early in a proceeding, an inflexible requirement that such motions come prior to any prehearing conference is too strict. In CEC powerplant siting proceedings, the locational alternatives analysis required under CEQA is frequently performed during and after the period when a prehearing conference is held. A project location alternative may become public after the first prehearing conference; persons affected by alternative project locations may thus be informed that their interests may be affected after the first prehearing conference. Obviously, it would be an unfair denial of due process to disallow the ability of such parties to participate fully in the proceeding as intervenors.

We therefore suggest that subdivision (b) be revised to allow agencies by regulation to allow intervention after the first prehearing conference if the motion for intervention indicates that the intervenor could not reasonably have known that his rights

would be affected until after the prehearing conference. This could be accomplished by adding a second sentence to subdivision (b), as follows:

> However, an agency may, by regulation, allow intervention after the prehearing conference if the motion for intervention demonstrates that the person seeking intervention could not reasonably have known that his rights would be affected until after the prehearing conference.

Section 644.120. Conditions On Intervention. This section provides the presiding officer with power to limit and condition an intervenor's participation. These discretionary limitations are well-considered and should promote an orderly hearing process.

Section 644.140. Intervention Determination Nonreviewable. This section provides that the presiding officer's rulings on motions to intervene, including the denial of such motions, or the modification of orders granting intervention, are not subject to administrative or judicial review. Although the presiding officer in a proceeding should have broad discretion regarding intervention, and should not fear that the final decision would be in legal jeopardy because of a decision regarding intervention, a blanket denial of judicial and administrative review seems extreme. It leaves a party with no recourse if the presiding officer is behaving capriciously or abusively. This section would also contravene the CEC's current procedure which would at least permit a party denied intervention to appeal that question to the full commission.

The Law Revision Commission should consider alternatives short of denying all administrative review. We would at least request that agencies be permitted to provide for administrative review by regulation.

Section 649.160. Service of Final Decision on Parties. The final sentence of subdivision (a) states that "[f]ailure to state the time within which judicial review may be initiated extends the time to six months after service of the decision." This would not apply to the CEC, as its judicial review provisions are expressly set forth in the Warren-Alquist Act. However, the six month provision would also conflict with the time specified for judicial review of any adjudicative decision made pursuant to CEQA, which sets forth a specific statute of limitations for challenges to licensing decisions based on environmental impact reports and negative declarations. We believe that the rule of statutory construction providing that a specific rule (i.e. one for CEQA decisions) controls the general (one for all APA decisions) would be applied to resolve this conflict, but it may be appropriate for the Commission to clarify in a comment to this section that

specific statutes of limitations under CEQA or other statutes would still apply notwithstanding this provision.

Section 649.230. Review Procedure. Subdivision (a) states that "[a] copy of the record shall be made available to the parties." In CEC power plant licensing proceedings (or PUC ratemaking proceedings) the record may be voluminous, including thousands of pages of testimony, transcripts, exhibits, and so forth. The section or its comment should clarify that, at least in these situations, an agency may "make available" the record by either (1) copying it at the expense of the requesting party, or (2) allowing it to be reviewed in the agency's docket office. The latter option may avoid time-consuming and expensive copying duties that would inconvenience both the agency and the parties. In any event, it is important to clarify that this provision is not intended to require the agency to provide a copy at its own expense.

State of California — Health and Welfare Agency

Memorandum

To : CALIFORNIA LAW REVISION COMMISSION
Attention: Nathaniel Sterling
Executive Secretary

Date : September 1, 1993

Subject : Comments on Tentative Recommendation on Administrative Adjudication

From : Department of Social Services

This memorandum is intended to cover the concerns of this department with the exclusion of the hearing function of the state supervised, county administered, welfare and services programs. Comments concerning procedures for the welfare and services hearings will be addressed in a supplemental memorandum. Currently the major use of the central panel by the California Department of Social Services (CDSS) is in the licensing of facilities to care and supervise those persons who cannot do so themselves in community facilities. These include child day care, adult day care, residential facilities for adults, residential facilities for the elderly, foster care homes, group homes for children and other programs generally found at sections 1500 et seq. of the Health and Safety Code. By statute the denial of applications for or revocation of licenses for these facilities is governed by both procedures within the Health and Safety code and the Administrative Procedure Act adjudication procedures (APA).

As an agency we have a disagreement with the guiding philosophy of the commission. While we can see the advantages of revamping the current APA, we cannot agree that the various alternatives to the act create the problems discussed within the Introduction to the Tentative Recommendation. We believe that the efficiencies of tailoring due process procedures to specific needs of programs outweighs the advantages of a single act for all hearings. For example, the welfare hearings system processes almost 6,000 requests for hearings each month, and has its own state and federal rules which govern every aspect of the process. On the other hand procedures for uniform processing of cases that go before the central panel and similar cases makes good sense to us. As an agency we are willing to forego some of the special statutes in our programs for the sake of uniformity.

Although our specific comments appear on the attachment to this memorandum, we are especially concerned with the scope of the

new APA. Section 641.110 requires an APA hearing not only as now provided, when the statute so requires, but when any hearing or adjudicatory proceeding is required by statute or by either the state or federal constitution. This is a troubling requirement. While we recognize that the conference hearing will ameliorate some of our concerns, it does not do so in a manner that will substantially meet our needs. First, there are times that the proper place to go for constitutional relief is the court system. Even though as a general rule the APA proceedings are less expensive then Superior Court such is not always the case.

Where an applicant for the test of Administrator in one of our facilities misses the deadline for application or on the application fails to include transcripts for education, we do not give that person an APA hearing on not accepting the application or returning it without a denial. Nor do we give the person a right to an APA hearing when they flunk the test. In these cases the person is free to bring a writ of mandate against the department, but he or she knows that barring something extraordinary they will not only lose they will be wasting resources. This will not be the case if a right to appeal is included with the notice that the applicant flunked the test or that the application was incomplete. The same is true for monetary fines levied against persons operating without a license and those operating in violation of the law or regulation. There is no doubt in our minds that the constitution requires that these people be given an adjudicatory proceeding, but the court system is that place not an APA hearing. At this time our statutes require that any fine may be appealed up three levels of informal review at the field staff and deputy director level. After that there is no further remedy at the departmental level. These fines start at $25 and go up to $200 per day per violation. The department still has to enforce the debt, but can do so through means other than court. Finally, the licenses issued by the department have no renewal date. There are yearly fees however. Should a licensee not pay their fee their license is subject to forfeiture. Certainly they have a constitutional right to an adjudicatory proceeding over that forfeiture, but we do not give them an APA hearing.

There are other situations in which a hearing is fashioned to to meet the minimal precepts of the flexible concept of due process. In those cases the multiplicity of hearing procedures is not a sin. The agency gives the person a full description of their hearing rights at the time of the agency decision. Certainly the Skelly hearing for personnel matters is constitutionally required, but would become meaningless if it were to become a full APA hearing.

Clearly we believe that the definition is too broad. We suggest that the section be simplified to cover only statutorily required adjudicative proceedings. The state and federal constitutions are just too broad to attempt to fit the varied due process rights into one act no matter how flexible. The cost of such an endeavor is prohibitive and wasteful.

We would like to highly commend the commission for many of the changes in the act, and be excused for not mentioning all the most worthwhile provisions, but the exigencies of time force a tilt in our comments toward the trouble areas.

Thank you this opportunity to comment, and for the generous and informal manner in which you conducted the meetings of the commission in the discussions which led to this Tentative Recommendation.

Lawrence B. Bolton
Deputy Director, Legal
Division

COMMENTS

Section 610.190. Agency

This proposed section sets forth a new definition of agency. One problem this section tries to solve is that of to whom to appeal an action taken by a person purporting to act for the agency. We think that a practical approach to solving this problem would be to require that any agency action from which an appeal is permitted by law include the name of the agency taking the action and the proper manner in which to appeal in its notice of the action. We were under the impression that this was the typical statutory requirement. It often the case that a division chief or other person will be given authority to act for the director, but that does no make the delegatee and his or her unit the agency for purposes of the APA hearing. That transformation is apparently what happens under this section. In the federal system with its multiplicity of commissioners within agencies a definition such as this might be necessary, but in California it is not.

Section 610.460 Party

This section includes within the definition of "party" an intervenor. This overly broadens the definition. Parties are given certain responsibilities and powers in this act, and many may be inappropriate for interveners. Even picking the site of the hearing would require agreement of the intervenor under section 642.430(b)(3). As a practical matter the reviewers of this code are not going to be thinking that party includes intervenors every time they see the term. I know that commenting on the code is difficult when the term refers to more than the respondents and the complainant. For clarity the sections should include reference to intervenors when they are to be included.

Section 612.150 Contrary statute

We support this section which clearly sets forward the general rule that an express statute overrules a contrary general provision. This is not an academic exercise as there is currently a dispute over a statute in the Welfare and Institutions Code that varies the definition of regulation, but predates the latest amendments to the Government Code definition of regulation. Also should an agency or the commission miss a statute which provides for a exemption from the APA this statute will make it clear that the exemption is not lost by oversight.

Section 612.160 Suspension of APA by Governor

This section provides for the suspension by the Governor of the APA when he or she determines that to do otherwise would cause a denial of federal funds. The experiences of this department and others in matters such as this is that placing the decision in the hands of the already overburdened Governor creates a hardship on all concerned. While a decision such as this one should not be taken lightly, the commission may wish to reconsider placing the decision making authority in the hands of the Secretary of the Agency under whose authority the funding or services resides or the Governor where the funds are not under such authority. This will avoid the problem of having the director of a department make this decision by removing it to a cabinet level decision, but will not overburden an already overburdened Governor.

Sections 613.210, 613.220 and 642.330 Service and delivery

The effect of these sections is to end the exception to personal service where the initial pleading is mailed by registered letter to the respondent at the respondent's official address in cases where the respondent is required to maintain an address with the agency. Currently the service is effective even though returned pursuant to Government Code 11515(c). This deletion of service being effective by registered mail will cause confusion, expense and public detriment. No one should be able to keep a license or certificate by the expediency of evading service, especially where the person is required to keep the licensing agency appraised of his or her mailing address. In the case of our department licenses where there is no renewal required, this would be a very expensive game of hide and seek. The current provision of law should be retained.

Section 641.110. When adjudicative procceeding required

Please see our opposition to including all ajudicative proceedings required by statute or constitutional decisions in the memorandum transmitting these comments.

Article 2. Declaratory Decision

We support this article in that it permits agencies to decline with reasons any request for such decisions. The department has not yet thought of how this process would be used in the context of the programs it administers, and that being the case has no further comment.

Article 3. Emergency Decisions

Our department currently issues Temporary Suspension Orders which suspend a license prior to hearing, at a date set by the order, and require that the hearing, if there is to be one, begin within 30 days of the receipt of a notice of defense. It is unclear from the draft, and we cannot ascertain if the commission intends to repeal our current statutes on Temporary Suspension Orders. We are going to presume that the commission does not intend to repeal the current statutes.

Section 641.310 Regulation Required

We support the concept that agencies may have a need to act quickly even where the Legislature has not addressed the issue. Regulations appear most appropriate.

Section 641.350 Completion of proceedings

Although we understand that the commission does not intend to change our current authority to issue Temporary Suspension Orders, we would like to comment upon this section. It is our agency's current requirement to serve the accusation as part of the Temporary Suspension Order, but this system of bifurcating the two might be beneficial in that there may be reasons to revoke a license in tandem with the reasons for the emergency order, and this method will define the issues clearly.

Section 642.230. Action on Application

This section requires an APA hearing be initiated when required by Section 641.110. As we believe that the breath of 641.110 is over broad, this statute suffers the same malady. Subdivision (f) permits the agency to deny an application for a decision when the application is not submitted in a form substantially complying with an applicable statute or regulation. We do not believe that this subdivision goes far enough in permitting on agency to deny hearings to applicants who fail exams or fail to show qualification to sit for a test.

It would be preferable to approach this section from the obverse. This section gives everyone a right to a hearing unless one of the exceptions is met. We prefer the sureness of the present statute which delineates when a hearing is required.

Section 642.240. Time for action

This section is somewhat difficult to read. Under the current scheme in the licensing context, the agency denies the

application and the applicant may then appeal the denial. It is the appeal of the denial that requires the agency commence an adjudicative proceeding. At first we thought that this statute kept that scheme of things. But under this section the agency has 90 days to act on an "application for agency decision" by either (1) granting or denying the application or (2) commencing an adjudicative proceeding. It is easier to read the phrase "application for an agency decision" as the appeal from the denial than as the simple denial of an application. The comments to section 642.220 state that an application for a decision can either be to conduct an APA hearing or issue a decision. In the context of 642.240 which is about time frames it could easily be read as a substantive section which requires not just a denial to an application for a license, but also an initial pleading. This is because of the choice given. An application should always be answered with a grant or denial, but the command to commence an administrative proceeding puts that matter in doubt. An applicant once served with a detailed pleading should be required to respond with a notice of defense to confirm a desire to have a hearing.

Section 642.440. Notice of Hearing

While this section may be changed by regulation the 15 day advance notice, 20 days when sent by mail, may be unnecessarily long. We have had few problem with the requirement of 10 days now in law. In order to change these time frames by regulation the department will have to show a necessity to do so. We cannot read the minds of the Office of Administrative Law, but that office may require a strong showing where time lines are being altered. Our department now has a require that all virtually all matters be brought to hearing within 90 or 60 days of the request for a hearing (receipt of the notice of defense). Adding 5 more days to the process will make it that much harder to schedule the hearing. Also in cases of Emergency Decisions and in the department's case Temporary Suspension Hearings the extra days may create hardships. The TSOs are required to be brought to hearing within 30 days of the receipt of the notice of defense.

Section 643.210 Disqualification of Hearing Officer

Our agency has been on record as favoring a method by which pre-emptory challenges by declaration would be in the APA. Unfortunately, as brought out at the hearings, the logistics of such a plan are quite difficult to execute. The suggestion by some parties at the hearings that the names of everyone on the panel of judges for the district be sent out to the parties and

the challenge be made to one name on the panel by each party (but not intervenors) does answer many of the concerns of scheduling and multiple challenges. We think that this approach might be worth further exploration.

Section 644.110 Intervention

The chapter on intervention does not permit the departments to make it inapplicable by regulation. It is mandatory. We cannot recommend the adoption of this chapter without it becoming optional.

On a subject by subject analysis, intervention might be a good idea. In welfare hearings, the fact that the party is receiving aid or services is confidential. In many licensing matters, the names and details of the residents (victims in some cases) is confidential. The intervenor would have access to all sorts of confidential information. In many cases the insurance company representing the licensee will want to intervene, and with this law change may believe compelled to intervene to protect future interests.

This section will also represent a possible cost item. The agencies must pay for their own time, and the time of the OAH. These costs are substantial. The hours or days spent on motions to intervene will cost thousands of dollars in each case. We can see clients of licensees wishing to intervene that they or their relative can continue to receive care or reside at a now licensed facility which is the subject of the hearing. While such a person would not seem to have rights, duties, privileges or immunities affected by the action, it is not that big a stretch to say such rights are affected. The question at a licensing hearing deals with whether the license should be affected. The licensee can bring any relevant item to his or her defense. A third person intervening will unnecessarily lengthen the process and cause undue expense.

Section 645.130 Depositions

This section continues the current rules for deposition of witnesses who will be unable to attend the hearing. Under the current statute and this section, it appears that when a deposition is to be held outside the state a court order must issue to that effect. The court order is to be obtained by the agency. This seems wasteful in the case in which the witness is willing to testify. It would seem that even if one party objects, no further order should be necessary. The ALJ should be able to quash the subpoena on a noticed motion in such a case. Also the order of the Superior Court should be obtained by the party seeking the deposition.

Section 645.230 Discovery of statements, writings, reports

One substantial change in this section from current law is the dropping of the phrase "and which would be admissible in evidence" from the phrase "Any other writing or thing that is relevant." This omission is not explained in the comments. It would seem to put to rest the withholding of writings and statements that would only be used in rebuttal. A comment to the effect of this change would be helpful to guide the public.

Article 4. Subpoenas

This article gives the agency and presiding officer more authority then under current law. The presiding officer can quash a subpoena, rather than forcing the parties to go to superior court. This will save much time and expense in these matters.

It would seem that this is the place to put any relief available in Superior Court. In matters of subpoenas such relief prior to compelled discovery is necessary for the protection of protected information. Compelled discovery cannot be undone just as a bell cannot be unrung.

647.110 Conference hearing

Paragraph (a)(5) by implication gives licenses a right to a hearing in matters that do not involve revocation, suspension, annulment, withdrawal or amendment of a license. Disciplinary matters that involve fines and the like should not be the subject of an APA hearing unless the Legislature explicitly gives such a right. These matters that do not put a license at jeopardy should not be the subject of an APA hearing. Even though factual matters will be in dispute, an informal process is all that is needed. The hearing need only be before someone who did not make the decision in the first place which can be a relatively low level manager.

Section 648.130 Default

Vacancy Of Default

This section would define good cause for vacating a default on the basis of mistake, inadvertence, surprise, or excusable neglect. Even though the agency may grant the new hearing on these bases the definition of good cause is such that it appears the grant will become mandatory as it will be an abuse of discretion to do otherwise. After a showing of failure to receive the initial pleading or notice of hearing an agency would be hard pressed to deny a vacation of the default. As the inclusion in the statute of mistake and inadvertence is

given equal status to failure to receive notice, we believe that a court would determine that no matter what the mistake or inadvertence, it was good cause. It would be preferable to give no example of good cause to avoid the problem.

Burden Of Going Forward

Current law is ambiguous in regard to the action necessary to take a default. Where no notice of defense is filed our agency makes finding of fact based upon the evidence in the file. Where the notice of defense is filed and the respondent fails to appear at the hearing there is a split of opinion. Some would hold that the agency must put on its case through witnesses or affidavits, and the ALJ will write a proposed decision determining if there is enough evidence to revoke the license. The others would hold that a default can be had at a failure to appear by the agency making its own finding at a time other than at the scheduled hearing. In keeping with this draft, since missing a settlement conference can be a default, it would appear that a default for failure to appear at the hearing would not lead to a one sided hearing unless the agency wished to make such a record.

Section 648.140. Open Hearings

Please see our comments to 648.350 concerning the protection not only child witnesses, but also developmentally disabled, mentally ill, and others whose privacy rights might require the closure of the hearing to the public.

648.310. Burden of Proof

This section paints with too broad a brush. There is no definition of an occupational license. By statute our agency need only prove its case by a preponderance. We understand that the statutes will override this provision. Nonetheless, there is quite a difference between an occupational license that was earned at the expense of 7 or 8 years of college work and an occupational license that requires no real preparation other than an application and payment of fees. Adopting this standard may end some confusion, but it appears to go way beyond the current state of the law. The ability to change the burden by regulation is unrealistic. The statement in this section will become the law and agencies will not be able to change it by regulation, but only by statute. We believe that a further definition of "occupational license" is needed, or that subdivision (b) should be deleted in favor of permitting case law to stand.

648.340. Affidavits

Subdivision (d) of this section state that for this section affidavit includes declaration. As we understand that declarations will always substitute for affidavits so long as they are made within the state, this subdivision appears unnecessary. That being the case it might cause confusion in that other affidavits required in the Government Code might be wrongly presumed to not include declarations. If felt necessary the reference to the Code of Civil Procedure in the comment would suffice to make the matter clear.

648.350. Protection Of Child Witnesses

This section does not go far enough. Under Seering this department has been successful in also showing that developmentally disabled persons are entitled to the same protections as children. Also looking at 648.140 the reason to close the hearing in the interest of fairness, not the protection of the witnesses. We would suggest that the reference to "children" in this section be removed, thus giving discretion to the judge to weigh the right to confront witnesses and the public interest in open hearings against the harm to witnesses and their unavailability otherwise.

648.450. Hearsay

This section permits a finding to be based upon hearsay only if that hearsay would otherwise be admissible in a civil action. The federal rules of evidence vary from the rules in California. We would suggest that this section specifically adopt both the federal and state rules. We can see no purpose in restricting the rules to hearsay exemptions found only in state court. Also the experience with the federal rules may give some impetus to studying those rules for adoption in this state.

Section 649.230. Review Procedure

An interesting question comes up under this section. Should an agency that finds no fault with any of the decision of the administrative law judge except the penalty be forced to order the entire transcript in order to make the penalty more severe? While the notice and opportunity to argue provisions are no doubt necessary in such a situation, why should the agency be forced to order a very expensive transcript over uncontroverted findings. On a motion by the respondent, without the transcript, the agency can lessen the penalty. The distinction for increasing the penalty is really without a difference except that limited budget agencies must weigh the cost of the transcript against the public good.

Article 3. Precedent Decisions

The authority given to adopt precedential decisions will be a valuable resource both to the agencies and the public.

CONFORMING REVISIONS AND REPEALS

Gov't Code section 11340.4. Study of rulemaking

When the Office of Administrative Hearings had nominal control of the rulemaking process this provision of law was innocuous. Now that the Office of Administrative law has been created with all its powers concerning underground regulations this section is no longer innocuous. We can see no necessity to transfer theses responsibilities and investigative requirements to OAL. Reports to the Legislature on a continuing basis have recently met with disfavor in the Legislature.

THE STATE BAR
OF CALIFORNIA

OFFICE OF RESEARCH

555 FRANKLIN STREET, SAN FRANCISCO, CALIFORNIA 94102-4498 (415) 561-8200

September 2, 1993

Robert Murphy
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Comments on Tentative Recommendation Concerning Administrative Adjudication by State Agencies

Dear Mr. Murphy:

Enclosed are the comments of the State Bar's Committee on Administration of Justice concerning the Law Revision Commission's tentative recommendation on administrative adjudication by state agencies circulated for comment in June 1993.

These comments are only those of the Committee on Administration of Justice. They have not been adopted or endorsed by the State Bar's Board of Governors and should not be considered the position of the State Bar of California.

We appreciate the opportunity to comment on this tentative recommendation. Please contact me if you questions or need further information concerning these comments.

Sincerely,

David C. Long
Director of Research

DCL:ec
Enclosures

cc: Margaret Morrow
William Dato
Donn Pickett
Monroe Baer

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THE COMMITTEE ON ADMINISTRATION OF JUSTICE
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

TO: David C. Long,
Director of Research

FROM: Committee on Administration of Justice

DATE: September 3, 1993

RE: Law Revision Commission's Tentative Recommendation on Administrative Adjudication by State Agencies

INTRODUCTION

In 1987 the Legislature authorized the California Law Revision Commission to study whether there should be any changes to the current Administrative Procedures Act, Government Code 11500 et seq. The Commission divided its tasks into four parts, roughly defined in order of priority as (1) administrative adjudication, (2) judicial review, (3) rule making, and (4) non-judicial oversight. In May of this year, the Commission circulated for comment its first tentative recommendations directed at the initial area of study: administrative adjudication by state agencies. The State Bar Committee on Administration of Justice ("CAJ" or "the Committee") has reviewed the Commission's recommendations and respectfully submits the following comments.

BRIEF HISTORY

California's Administrative Procedure Act ("the Act") was enacted in 1945 in response to a study and recommendations by the Judicial Council a year before the federal act and before that of almost any other state. No comparable APA then existed and the entire concept of an administrative procedure code applicable to agencies in general was untried and controversial. In New York, the Benjamin Commission recommended in 1942 that no such statute be enacted, believing that the variation in adjudicatory practice among the state's administrative agencies made it inadvisable or even impossible. At the federal level, the majority of the Attorney General's Committee on Administrative Procedure had recommended enactment of a federal statute whose provisions on adjudication had limited scope.

Today the Act regulates adjudicatory procedure in about sixty-five agencies. It provides for a single, unvarying mode of formal trial type procedure conducted by an independent

administrative law judge assigned by the Office of Administrative Hearings. The current Act is limited in scope because its adjudication provisions fail to cover a large number of important agencies that engage in adjudication: the Public Utilities Commission, the Workers' Compensation Appeals Board, the Unemployment Insurance Appeals Board, the State Board of Equalization, the Agricultural Labor Relations Board, the State Personnel Board, and others. The Commission states that the non-APA agencies conduct at least 95% of the adjudication occurring each year at the state level in California, leaving less than 5% of the adjudication for agencies covered by the APA. Adjudication in non-APA agencies is subject to procedural rules outside the Act and, of course, there are statutes, regulations, and unwritten rules prescribing the adjudicatory procedures of each non-APA agency, waiting to trip the unwary public or the unseasoned or inexperienced practitioner. These procedures vary enormously from formal adversarial hearings to informal meetings. The only unifying theme among them is that adjudication in these agencies is not conducted by an Administrative Law Judge assigned by the Office of Administrative Hearings. Generally the persons who make the initial decisions in these agencies are employed by the public agency.

Based on this backdrop the California Law Revision Commission sets forth the tentative recommendations, which promise to incorporate a customized statute that adds procedural and substantive improvements such as conference hearing, alternative dispute resolution and other features.

CENTRAL PANEL OF ADMINISTRATIVE LAW JUDGES

The Commission reports that California was the first jurisdiction to adopt a central panel of hearing officers who would hear administrative adjudications for different agencies which do not employ their own administrative law judges and hearing officers. The Commission recommends that there should not be a general removal of state agency personnel and functions to a central panel, but that any transfer of hearing functions to a central panel should be specific to the particular agency involved, and its functions should be based on a showing of the need for the particular transfer.

The Commission expresses six reasons for its position:

1. The Commission's investigation did not reveal any evidence of unfairness or perception of unfairness in California.

2. The various agencies are generally satisfied with their present in-house hearing personnel.

3. Most agencies that employ a significant number of in-house judges are themselves purely adjudicatory agencies, instead of agencies with a mixture of

prosecutory and adjudicatory functions.

4. Centralization is not likely to generate savings and could increase costs, based on a 1977 study.

5. The agency charged with administering an area of state regulation needs to be able to control the enforcement process.

6. Each agency, its mission, and its needs are unique.

CAJ questions certain of the rationales articulated by the Commission. The existing Administrative Procedure Act by its terms applies to specifically identified agencies and proceedings, whose hearings would be conducted by personnel employed by the Office of Administrative Hearings. (Govt. Code Sections 11500(a) and 11501.) Under the proposed statute this drafting technique would be reversed; the Administrative Procedure Act would apply to all agencies, and hearings of all agencies would be conducted by Office of Administrative Hearing personnel unless expressly excepted. The hearings expressly excepted, however, are those not presently governed by the Administrative Procedure Act which constitute 95 percent of the administrative adjudication in California.

Administrative proceedings may provide the only effective opportunity for the citizen to assert or protect certain rights in disputes with state agencies. Both fairness and the appearance of fairness in such proceedings is critical. The Committee questions the Commission's observation that its investigation "did not reveal any evidence of unfairness or perception of unfairness in California." Our collective experience indicates that there is an appearance of unfairness, under the current structure, particularly to the average citizen who is the responding party. To the extent the public perceives that the administrative agency is acting as accuser, judge, jury and executioner, its faith in the process may be eroded.

Creating large-scale exemptions to the central panel concept is also not excused by the second reason cited by the Commission, namely that "the various agencies are generally satisfied with their present in-house hearing personnel." Respondents may not be satisfied with those same personnel and the existence or even appearance of unfairness is one of the causes of increasing alienation of members of our society from government and its adjudicatory structures.

The rationale that the agency charged with administering the area of state regulation needs to be able to control the enforcement process is a succinct expression of the very reason why hearing

officers should be as independent of the administrative agency as reasonably possible if respondents are to receive the appearance of a fair hearing. Citizen-respondents will understandably question a hearing before an administrative hearing officer not clearly separated from the prosecuting agency.

Exemptions from the central panel process should be sparingly created only be statute and only in those situations where the agency regulates a specialized and sophisticated constituency or the subject matter is so new or complex that the use of an agency judge or hearing officer is the only realistic means of achieving justice. Where a requested exemption is purportedly based on the need for technical expertise, it should be granted only where there is a consensus among parties and attorneys regularly participating in such adjudications that central panel hearing officers cannot develop sufficient expertise on a case-by-case basis.

ROLE OF THE ADMINISTRATIVE LAW JUDGE

Under the existing Act, fact finding is done by an administrative law judge (ALJ) employed by the Office of Administrative Hearings. The head of the administrative agency may either adopt the proposed decision of the administrative law judge or reject it and decide the case itself on the record. The new proposal could change the format:

1. Each agency head will decide whether the hearing will be conducted by an ALJ or by the agency head itself.

2. If the agency head conducts the hearing, the agency head will issue a final decision within 100 days after the end of the hearing.

3. If an ALJ conducts the hearing, the ALJ renders a proposed decision within thirty days after the end of the hearing. The agency head has 100 days within which to act on the proposed decision. If the decision is not acted upon within that time, it becomes final by operation of law.

4. A proposed decision or a final decision is subject to administrative review only in the discretion of the agency.

Under current law, the general rule is that an appeal to the head of the agency is available as a matter of right. If the Commission proposal is adopted, an appeal to the head of the agency will only lie in the discretion of the agency. The

reviewing authority will then be limited to a review of the record, except for newly-discovered evidence or evidence that was unavailable at the time of the hearing.

A possible result of this change will he an increasing number of administrative mandamus proceedings. To the extent that the agency elects not to allow the head of the agency to reconsider a decision, the parties will be left with no recourse other than judicial relief. The Commission points out that an appeal to the agency head has "attendant expense." The expense of appealing to the head of an administrative agency is substantially lower than the expense of filing or responding to a petition for administrative mandamus or other judicial proceedings. The Commission does not discuss any reasons for its recommended change, nor does it analyze the fiscal impact on the judiciary. Particularly in light of recent significant reductions in judicial budgets, CAJ opposes the change to optional review by the agency head on grounds it will force more administrative cases into the courts. Otherwise the Committee supports the proposed changes.

IMPARTIALITY OF THE DECISION MAKER

The Commission has recommended five additions to the APA to assure fairness and due process. The proposal is written so that almost each element which would assure fairness is offset by exceptions which take away such assurances.

The proposal will require that:

1. The decision be based exclusively on the record in the proceeding.

2. Ex parte communications to the decision maker are prohibited.

3. The decision maker be free of bias.

4. Adversarial functions be separated from decision making functions within the administrative agency.

5. Decision making functions should be insulated from command influence within the agency.

The requirement that the decision be based exclusively on the record of the proceeding codifies current decisional law in California. (Section 649.120(c).) The evidence of the record may include the knowledge of the decision maker and other supplemental evidence not produced at the hearing, if that

evidence is made a part of the record and all parties are given an opportunity to comment on it.

Another change is the prohibition against ex parte communications with the decision maker. Under present law, factual information must be given to the decision maker on the record, but the law is not clear whether ex parte contacts concerning law or policy are permissible. The principle which ought to govern administrative proceedings is stated by the Commission: "Fundamental fairness in decision making demands that any arguments to the decision maker on law and policy be made openly and subject to arguments by all parties." But the proposal nevertheless permits the decision maker to obtain advice and assistance from agency personnel, clouding the "fundamental fairness" concept. (See generally Howitt v. Superior Court (1992) 3 Cal. App. 4th 1575, 1582.) The decision maker would be permitted to discuss "non-controversial matters of practice or procedure." The proposal does not define this phrase but creates an expansive exception for ex parte communications at section 648.520.

The proposal also contains provisions for disqualifying the decision maker for bias, prejudice, interest, or any other cause provided in this part. Section 643.210. The proposal goes beyond existing law to provide that, if disqualification of the decision maker would prevent the agency from acting, the decision maker is nevertheless disqualified, and another person may be substituted for the decision maker by the appointing authority. The subcommittee supports these provisions proposed in section 643.130.

Existing statutory and decisional law on the separation of administrative and adjudicatory functions is not clear. The proposal attempts to clarify the law as follows:

1. Agency personnel may confer in making preliminary determinations, such an probable cause for issuing the initial pleading. Proposed section 643.330 destroys the separation of functions by permitting a person who participated in determining that there was probable cause to serve as the presiding officer in the proceeding which results from that person's decision. If the person who decides to prosecute an administrative proceeding may ultimately adjudicate the result of that proceeding, the bias is inherent.

2. If the adjudicatory proceeding is non-prosecutorial, and a person has been an investigator or advocate more than one year before the time he or she sits as an adjudicator in the case, there in no disqualification. The Committee agreed that the likelihood of bias also

in inherent even here.

Section 643.330 also would permit an investigator or advocate to give advice to the adjudicator concerning a technical issue, if the proceeding is non-prosecutorial in character and the advice is necessary for and not otherwise reasonably available to, the adjudicator, provided that the content of the advice is disclosed on the record, and all parties have an opportunity to comment on the advice. Although this may be necessary in administrative cases that involve specialized, technical issues, an additional element should be required. Before seeking or receiving the advice, the adjudicator ought to give notice to the non-agency parties and an opportunity for them at least to be present.

Proposed section 643.330(a)(3) would also permit an investigator, prosecutor, or advocate to advise the adjudicator concerning a settlement proposal advocated by that person. The Committee opposes this provision.

VENUE

Section 642.430 provides that administrative hearings shall be held in San Francisco, Los Angeles, Sacramento, and San Diego. This section should include other sites as venues, such as Riverside, Fresno, Redding, San Luis Obispo, etc. The state is in a much better position to move the venue than litigants. At a minimum there should be a venue in each location in the state at which the Court of Appeal is authorized by the Legislature to regularly hear cases.

PREHEARING CONFERENCE

Section 646.110 is a new provision and the Committee supports it. However, CAJ recommends that prehearing conferences not be converted into an adjudicatory hearing and ADR should be considered where possible. The proposed law makes the prehearing conference, presently available in proceedings before 1945 California APA agencies, applicable to all state agencies, subject to the ability of an agency to control its use by regulation. The prehearing conference is conducted by the presiding officer who will preside at the hearing. Settlement possibilities may be explored at the prehearing conference. If it appears that there is a possibility of settlement, the proposed law allows the presiding officer to order a separate mandatory settlement conference, to be held before a different settlement judge if one is available. Offers of compromise and settlement made in the settlement conference are protected from disclosure to encourage open and frank exchanges in the interest of achieving settlement.

CONFERENCE ADJUDICATIVE HEARING

Section 647.110 is a new provision which allows for a more informal but non-biased decision-making process with some input from the parties. The standard formal adjudicatory hearing procedure may be inappropriate for some types of decisions. In some respects the administrative adjudication process has become too judicialized and too imbued with adversary behavior to provide an efficient administrative dispute resolution process. To address this concern, the proposed law proposed law permits agencies to resolve matters involving only a minor sanction by means of a conference adjudicative hearing process, drawn from the 1981 Model State APA. Section 647.110 allows an adjudicative process when there is no disputed issue of fact. The section allows a very relaxed procedure and permits the ALJ to drastically limit the proceeding. The Committee supports the proposal as modified.

ALTERNATIVE DISPUTE RESOLUTION

Section 647.210 is a new provision. CAJ questions why an agency should be able to pass ADR and recommends that the section be eliminated.

Section 647.220 unnecessarily restrict the use of ADR procedures. There is no need to limit the types of ADR processes when the parties are in agreement.

The proposal does not go far enough in connecting the relationship between ADR and settlement conference, especially if the parties agree to ADR.

Section 647.240 contains a good confidentiality and admissibility clause but the immunity provision is unnecessarily limited to mediators and arbitrators.

INTERVENTION

Under the old law it is unclear whether a third party may intervene. The proposal states a clear right to intervene upon an appropriate showing. Section 644.140 makes the decision regarding intervention nonreviewable. The Committee at least partially disagrees. The right to intervene may be significant and it should be reviewable along with any other part of the agency's decision, a denial of intervention should be immediately reviewable as a matter of right, whereas a grant of intervention should be subject to a more limited discretionary review.

CONTINUANCES

The Administrative Law Judge may grant a continuance when requested to do so by the parties. The proposal changes existing law in two respects. It increases the statutory period for seeking a continuance from 10 days to 15 days from the date when the need for a continuance comes to the party's attention. It also eliminates the judicial review component. CAJ opposes this latter change. There are circumstances in which the denial of a continuance can severely prejudice a party's ability to present his or her case.

SETTLEMENT CONFERENCE

The Committee believes there is no reason to limit the Office of Administrative Hearing proceeding and recommends deleting everything after the first comma in section 646.220 (b) and rewriting subdivision (d) to require use of telephonic conferences when available.

CONSOLIDATION AND SEVERANCE

The present APA contains no provisions for consolidation or severance. Proposed section 648.120(a) would permit consolidation of proceedings that involve common questions of law or fact. Proposed section 648.120(b) would permit the agency or the presiding officer to order a separate hearing of any issue in furtherance of convenience or to avoid prejudice or when separate hearings would be conducive to expectation and economy. These provision are copied from CCP 1048.

Proposed section 658.120(c) would provide that, if the agency and the presiding officer make conflicting orders for consolidation or severance, the agency's order controls.

The comment to proposed section 648.120 goes beyond the analogous provisions of CCP 1048 by permitting the agency to employ class action procedures at its discretion.

The Committee was divided on whether it is appropriate for an agency to have class action powers at the administrative level, but agreed that any employment of class actions procedures should be specifically spelled out rather than hidden in the comment to a narrowly drawn statute.

CONCLUSION

Consistent with the foregoing CAJ generally supports the California Law Revision Commission's legislative initiative with the proposed modifications. We very much appreciate being given

the opportunity to provide our comments.

cc: Margaret M. Morrow
William S. Dato
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Donn P. Pickett
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September 14, 1993

Robert Murphy
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Additional Comments on Tentative Recommendation Concerning Administrative Adjudication by State Agencies

Dear Mr. Murphy:

Enclosed are the comments of the State Bar's Litigation Section concerning the Law Revision Commission's tentative recommendation on administrative adjudication by state agencies circulated for comment in June 1993.

These comments are only those of the Litigation Section. They have not been adopted or endorsed by the State Bar's Board of Governors and should not be considered the position of the State Bar of California.

We appreciate the opportunity to comment on this tentative recommendation. Please contact me if you have questions or need further information concerning these comments.

Sincerely,

David C. Long
Director of Research

DCL:ec
Enclosures

cc: Margaret Morrow
Mark Mazzarella
Jerome Sapiro
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August 20, 1993

David C. Long, Esq.
Director of Research
The State Bar of California
555 Franklin Street
San Francisco, CA 94102

re: California Law Revision Commission Tentative Recommendation on Administrative Adjudication by State Agencies

Dear Mr. Long:

This letter is submitted on behalf of the Litigation Section in response to the California Law Revision Commission proposal to revise the Administrative Procedure Act (the "Act").

1. PRELIMINARY OBSERVATIONS

We applaud all the procedural changes in the Act which will increase the protection of the rights, duties, and privileges of all participants by clarifying and, in certain instances, broadening the procedural protections available under the Act. Hearings under the Act affect important rights and privileges of individuals and other entities, such as the ability to practice an occupation, the right to drive, or the privilege of conducting a business. Clarity in the Act will enable agencies to enforce and to carry out statutory duties in a fair and appropriate manner.

Ostensibly, the Administrative Procedure Act regulates adjudicatory proceedings in approximately 65 state agencies. It is supposed to provide a single format for procedures resembling trials conducted by administrative law judges assigned by the Office of Administrative Hearings. However, the current Act applies only to approximately five percent of the adjudications that occur in agencies that would otherwise come under it. It

does not cover the Public Utilities Commission, the Workers' Compensation Appeals Board, the Unemployment Insurance Appeals Board, the State Board of Equalization, the Agricultural Labor Relations Board, the State Personnel Board, and others. The Law Revision Commission states that the agencies which do not come under the Act conduct at least 95% of the adjudications that occur each year within the state government.

We are particularly concerned about the proposed new Act because it not only perpetuates the exceptions but makes the exceptions the rule. In addition to the present inconsistencies because adjudication in non-Administrative Procedure Act agencies is not uniform, the proposed new Act will allow each state agency to elect to exempt itself from most of the provisions which otherwise would protect the public and which are inherent if both the fact and the perception of fairness are to be afforded to people who appear before the agencies. Giving each agency discretion to adopt its own exceptions to otherwise uniform rules and eliminating most administrative proceedings from the Act is contrary to the public interest. Each exception and each election by an agency to opt out of the Act will create both substantive and procedural traps who appear before the agency and for attorneys who do not specialize in practice before that particular agency. In addition, because the adjudicators in most administrative proceedings are employed by the agency itself, rather than by the Office of Administrative Hearings, the existence of uniform procedural safeguards ought to be considered essential to a fair hearing.

In the spirit of trying to provide a more "user-friendly" set of regulations, the Litigation Section recommends the following:

2. ARTICLE 2: DECLARATORY DECISION

Proposed Article II (commencing with Section 641.210 of the new statute) creates and establishes the requirements for a new, special proceeding to be known as a "Declaratory Decision" proceeding. The Comment states that the purpose of the "Declaratory Decision" proceeding is to provide an inexpensive and generally available means by which a person may obtain "fully reliable information as to the applicability of agency administered law to the person's particular circumstances." The Summary refers to this as "administrative declaratory relief."

Proposed Section 641.210 provides that the Office of Administrative Hearings shall adopt and promulgate model regulations under this article "that are consistent with the public interest and with the general policy of this article to facilitate and encourage agency issuance of reliable advice." Section 641.210(a) also states that the model regulations shall provide for all of the following: (1) a description of the classes of circumstances in which an agency will not issue a declaratory decision; (2) the form, contents and filing of an application for a declaratory decision; (3) the procedural rights of a person in relation to an application; (4) the disposition of an application." We support the concept of administrative declaratory relief in principle. The public should be able to obtain reliable advice, and the procedures for doing so should be uniform.

However, the Act deviates from its own laudable goals two ways. First, proposed Section 641.210(b) gives the agency discretion to adopt its own regulations regarding declaratory decisions and to ignore the regulations adopted by the Office of Administrative Hearings under this article. Second, proposed Section 641.210(c) would also permit an agency to modify the provisions of this article or make the provisions of this article inapplicable to its own proceedings.

Giving discretion to all agencies to avoid or to modify the provisions of this article may make the article moot. Although the Comment to the proposed section provides the guidelines which the Office of Administrative Hearings or the specific agency should use in creating the regulations it expressly states that an agency may choose to preclude declaratory decisions together. It also states that the agency may include in its rules reasonable standing, ripeness and other requirements for obtaining a declaratory decision. Although the Comment states that "Agency regulations on this subject will be valid so long as the requirements they impose are reasonable and are within the scope of agency discretion," it invites non-uniformity of both practice and procedure as the rule, rather than the exception.

Proposed Section 641.220(a) provides: "In case of an actual controversy, a person may apply to an agency for a declaratory decision as to the applicability to specified circumstances of a statute, regulation, or decision within the primary jurisdiction of the agency." However, the Section also gives discretion to

each agency whether to issue a declaratory decision or not and does not define what an "actual controversy" is.

Section 641.220(a) provides that the agency shall not issue a declaratory decision if the agency determines, among other things, that the decision would substantially prejudice the rights of a person who would be a "necessary" party and who does not consent in writing to the determination of the matter in a declaratory decision proceeding. It does not define "necessary" but refers to a "necessary" party as "indispensable," without defining that word. The proposal should include standards by which the agency may determine who is a "necessary" or "indispensable" party and/or whether such a party exists. It also should state the consequences to the parties, the proceeding, and the agency, if the agency issues a declaratory decision that affects a party (whether "necessary" or not) about whom the agency does not know or who has not consented.

Indicative of the problem is Section 641.230, which provides: "Within 30 days after receipt of an application for a declaratory decision, an agency shall give notice of the application to all persons to whom notice of an adjudicative proceeding is otherwise required, and may give notice to any other person." The proposal should define how the agency would identify a person to whom notice of an adjudicative proceeding is "otherwise required."

The Commission might consider requiring the person who requests a declaratory decision to identify all persons who might be affected by it and limiting the effect of the declaratory decision to only such persons. The Act could give the agency discretion to refuse to render a declaratory decision if it believes that the person asking for the declaratory decision has not identified and given notice to all persons who would be affected by the requested declaratory decision.

Proposed Section 641.240 provides that, with qualifications, a person may move for leave to intervene in a declaratory decision proceeding. The Act should require all persons who may be affected by the proposed declaratory decision to receive actual, timely notice of the proceeding, and of their rights to intervene, so they may timely move to intervene.

Section 641.240(a) indirectly suggests that many features of a regular adjudicatory proceeding do not apply to a proceeding for a declaratory decision. The Comment to Section 641.240 explicitly states that other procedural requirements for adjudications do not apply to a declaratory decision proceeding. "For example, cross-examination is unnecessary since the application establishes the facts on which the agency should rule. Oral argument could also be dispensed with." The Comment says that there are no contested issues of fact in a declaratory decision proceeding,

> because its function is to declare the applicability of the law in question to unproven facts furnished by the appellant. The actual existence of facts on which the decision is based will usually become an issue only in a later proceeding in which a party to the declaratory decision proceeding seeks to use the decision as a justification of the party's conduct.

Ibid. It also states: "Note also that the party requesting a declaratory decision has the choice of refraining from filing such an application and awaiting the ordinary agency adjudicative process governed by this part."

Later sections and comments point out that a declaratory decision, like other decisions, only determines the legal rights of the particular parties to the proceeding in which it is issued. Although this would be consistent with due process, the declaratory decision procedure seems to be inconsistent with that aspiration. For example, the Comment to Section 641.240 and other sections and comments regarding the declaratory decision process also state that a declaratory decision has the same status and binding effect as any other decision issued in an agency adjudicative proceeding and that a declaratory decision issued by an agency is reviewable by a court. If, as discussed infra, a class action can be brought under the proposed Act [a concept we recommend be opposed], others will inherently be bound by the decision.

The provisions for intervention suggest that adversary proceedings should occur in declaratory decision proceedings. For example, if a third party disputes the statement of facts set forth by the person who requests the declaratory decision, he or she should be allowed to present evidence, cross-examine adversaries, and argue. Otherwise, intervention may be an idle

act. If the agency or the intervenor dispute the facts, shouldn't the petitioner be able to prove its case? If there is an "actual controversy," what is the value of deciding that "actual controversy" on the basis of a statement of facts which are simply "unproven facts furnished by the applicant?" What is the value of a court's judicial review of a declaratory decision based on an unproven statement of facts, which may be entirely fictional or self-serving? Wouldn't such judicial review waste judicial resources and violate the requirement that a court is to decide only actual controversies and not to issue advisory or hypothetical opinions?

Such problems suggest that, if that the subject of a proposed declaratory decision affects not only the applicant, but also another person, the declaratory decision procedure may well be either a pointless exercise or a violation of that other person's right to due process and a fair hearing. The general concept seems to make sense only in the situation where the person applying for a declaratory decision has a question regarding interpretation of, or the application of, a regulation that affects only that applicant or which takes place in a non-adversarial context. For example, it would be quite helpful if a person who wants to license a particular method of doing business could ask the California Department of Corporations (which has jurisdiction over the administration of the California Franchise Investment Law) whether, in the Department's opinion, the proposed method of doing business is a franchise (which would require the applicant to register with the state and meet other expensive statutory and regulatory requirements) or merely a license (which does not require such registration or expensive regulatory compliance). The answer to the applicant's question may save the applicant money, if indeed the applicant is merely a licensor rather than a franchisor, but also prevent the applicant from violating the law.

The proposed "declaratory decision" procedure should be completely rethought. What might otherwise be quite helpful in a limited form is, as presently proposed, murky and a substantial danger to due process.

3. ARTICLE 3: ALTERNATIVE DISPUTE RESOLUTION

Proposed Article 2 of Chapter 7 of the Act addresses alternative dispute resolution ("ADR"). Once again, the proposal gives an administrative agency the power to eviscerate the Act by

regulation (see proposed Section 647.210(b)) and by the fact that the Office of Administrative Hearings will be required to adopt "model regulations" governing ADR subject -- again -- to modification by agency regulation (proposed Section 647.230). With those limitations in mind, we recommend:

(1) Although the Commission expresses the desire to encourage alternative dispute resolution, there is no mechanism by which parties to an administrative proceeding are encouraged or even channeled into the ADR process. As an example, proposed Section 646.130 (on prehearing conferences) does not expressly include ADR as one of the subjects which should be discussed at a prehearing conference. Thus, although alternative dispute resolution is codified in the proposed act, the ADR possibility is "buried."

(2) We are concerned about the language of proposed Section 647.220(a), which gives the agency discretion to refer a dispute to ADR, even over the opposition of all parties.

(3) Because the word "agency" is defined at proposed Section 610.190 to include not only the agency itself but also the agency head, agency employees, and other persons purporting to act under the authority of the agency head, the Act does not specify who may exercise the apparently absolute discretion conferred on the agency as to whether or not a matter will be sent to ADR.

(4) We are concerned about possible constitutional or statutory problems raised by the interplay of proposed Section 647.220(a) with the confidentiality provision of proposed Section 647.240(a). Read together, they provide that, if a matter is sent to mediation, any communication made in the course of the mediation would be subject to a complete confidentiality privilege. Aside from the fact that it is not clear whether all aspects of a mediation would be subject to the confidentiality privilege (including the decision of the mediator), the involvement by a state agency in a proceeding which is sealed from public scrutiny may be indefensible. Sunshine, rather than secrecy, should be the norm in government decision making.

(5) Proposed Section 647.220(b) provides that the parties may agree to refer a dispute to binding arbitration. We are concerned that, in binding arbitration, the State may be giving up to unspecified private decision makers, whose qualifications and objectivity are not specified, its constitutional or statutory powers and discretions. This, too, may be constitutionally indefensible.

(6) The proposed Act does not expressly provide for the allocation of costs of ADR, the right to discovery in ADR, or the enforcement or review of a decision rendered or settlement reached pursuant to ADR.

4. ARTICLE 3: EMERGENCY DECISIONS

As to emergency decisions, we have the following concerns:

a. **Uniformity among agencies.** The proposal ostensibly encourages a laudable goal of uniformity of procedures among agencies covered by the proposed Act (see, e.g., Tentative Recommendations at 5-6). Nevertheless, proposed Article 3 delegates to each agency the discretion to destroy uniformity by adopting regulations governing the issuance of emergency decisions. Section 641.310 provides that any agency wishing to issue emergency decisions must adopt regulations defining, "the circumstances in which an emergency decision may be issued," stating, "the nature of the temporary, interim relief" available, and prescribing "the procedures that will be available before and after issuance of an emergency decision." This plenary delegation of authority would encourage each agency to tailor specific regulations to meet its own peculiar needs and institutional requirements. It would promote diversity among the various agencies, rather than uniformity.

b. **Vagueness and Overbreadth.** Several critical terms in the proposed Act are vague or overbroad, and, accordingly, appear to delegate virtually unlimited power and authority to the individual agencies. For example, proposed Section 641.320 states that an agency may issue an emergency decision "in a situation involving an immediate danger to the public health, safety, or welfare . . . . The term "welfare" is vague in this context and could be used to support the unfettered exercise of agency discretion to

issue emergency decisions in circumstances that may not warrant emergency action.

The notice requirements in the Act are also vague. Proposed Section 641.330 provides that, before an emergency decision is issued, notice to the respondent shall be given, "if practicable." The meaning of the word "practicable" in that context is left to the imagination. This section would permit emergency decisions to be issued without notice at all. It would vest the individual agencies with unlimited discretion to determine the nature and timing of notice, if any, to be given to respondents in connection with emergency decisions. (Compare, for example, the specific notice requirements for court-issued injunctions set forth in Code of Civil Procedure section 527, including the requirement that an attorney certify to the court, under oath, the reasons why notice should not be given, if such is the case.)

c. **Burden of Proof.** The proposed statute does not specify the burden of proof required to obtain emergency relief. Usually, an applicant for extraordinary emergency or temporary relief pending the resolution of an issue on its merits is required to meet specific and substantial evidentiary burdens before such relief will be granted. See, e.g., Code of Civil Procedure section 527 (requiring a verified complaint or affidavits for the issuance of a temporary restraining order or preliminary injunction). The committee expressed concern that no such procedural protections are included in the proposed statute.

d. **Completeness of Record.** Section 641.360(b) provides that "the agency record need not constitute the exclusive basis for an emergency decision" or for review of that decision. An agency emergency decision based on information extraneous to the record may be unreviewable as a practical matter. Indeed, its effect may be to bar all review, particularly if the standard of review is the abuse of discretion. See, e.g., proposed Section 641.380(c). Moreover, the proposal would also permit an agency to issue emergency decisions without regard to the contents of the record. We see no reason to vest agencies with such apparently limitless discretion.

e. **Statutorily defined emergency proceedings.** The tentative recommendations point out that there are already statutes providing that certain agencies may take emergency action when necessary. See Commission recommendations at p. 24 and note 87. We consider the current statutory regulation of emergency proceedings to be appropriate and are not convinced that there are sufficient reasons to delegate this power and authority to all the individual administrative agencies.

5. CENTRAL PANEL OF ADMINISTRATIVE LAW JUDGES

California was the first jurisdiction to adopt a central panel of hearing officers who would hear administrative adjudications for different agencies. However, many agencies now employ their own administrative law judges and hearing officers. Only certain, enumerated agencies use the central panel now. Gov. Code §§ 11,500(a), 11,501. The Commission recommends that there not be a general removal of state agency personnel and functions to a central panel, but that any transfer of hearing functions to a central panel should be specific to the particular agency involved, based on a showing of the need for the particular transfer.

We recommend that the proposal be disapproved. Its rationales are incorrect. The recommendation of the Law Revision Commission should be that all state agency hearing personnel and functions are removed to, compensated by, and assigned by a central panel, unless the adjudicative functions of the agency are expressly excepted by the Legislature. The process of deciding which adjudicative functions should be excepted from the general rule may take longer and require more detailed study, but the protection of the public requires no loss.

The concepts of fairness and the "appearance of fairness" are not merely theories but present the only means an individual has to protect his or her rights vis-a-vis the State. When the Commission states that its investigation "did not reveal any evidence of unfairness or perception of unfairness in California" [p. 11] the Commission must not have spoken with many people who have appeared before or who represent respondents before administrative agencies.

When an administrative adjudicatory hearing is held before a hearing officer who is employed by the agency which has initiated the proceeding, has review authority over the decision, and may communicate ex parte with the hearing officer, both unfairness and the appearance of unfairness result. For example, the appearance and reality of unfairness often occur in Department of Motor Vehicle hearings, where the hearing officer is an employee of the administrative agency. Assume, for example, a citation for driving with a blood alcohol level in excess of .08%, where the driver refused to take a blood alcohol test. Assume, further, that a court found lack of probable cause, so the arrest was improper, and the criminal case was dismissed. The driver finds an attorney who represents her before the Department of Motor Vehicles for low or no fee. She appears with that attorney at the date set in a notice received from the Department of Motor Vehicles. The hearing is at the Department of Motor Vehicles office. The hearing officer is an employee of the Department of Motor Vehicles. The hearing officer is the accuser. At the beginning of the hearing, the hearing officer insults both the driver and the attorney and openly expresses his opinion that the attorney is simply there to obstruct justice because the record shows a "clear violation." The hearing officer receives in evidence a semi-legible copy of the police report, but no police officer is present. The hearing officer refuses to accept the testimony of the driver to refute the statements contained in the police report and accepts the contents of the police report as conclusive. The driver may be able to subpoena the arresting officer, if the driver can afford the fee charged by the agency for whom the arresting officer works. If the driver cannot afford that fee, the hearing officer refuses to subpoena the arresting officer to the hearing. Therefore, an impecunious driver, whose attorney is working for little or no fee, cannot defend herself. Even though the criminal case was dismissed, her license is revoked, and she cannot even drive her child to day care in order to remain employed. She has no money to seek judicial review.

In administrative proceedings, the hearing officer may be the accuser, judge, jury, and executioner. Even if, legally and factually, the same result would occur after a fair hearing, the process is demeaning, leaving the respondent frustrated, angry, and bitter. Because administrative agencies adjudicate a huge volume of proceedings in which rights and privileges may be denied that are critical to the lives of the respondents, perpetuating the appearance of unfairness creates an ever-growing

group of people whose hostility could have been ameliorated. Continuation of these problems cannot be tolerated.

Not assuring the appearance of fairness is not justified by the second reason cited by the Commission, namely that "the various agencies are generally satisfied with their present in-house hearing personnel." [P. 11.] A system which gives the agency advantages will inherently satisfy the agency. Due process, fairness, and the appearance of objectivity are more important.

Centralization need not increase costs. Not all hearing officers need to be lawyers, and their compensation can vary in accordance with their qualifications. Hearing officers who qualify to sit in cases for one agency need not be qualified to sit as hearing officers in all cases. The mere fact that they are independent of the administrative agency will at least allow the respondent to have a reasonable expectation that the hearing will fairly be conducted.

The Commission's statement that the agency charged with administering the area of state regulation needs to be able to control the enforcement process [p. 12] is a succinct expression of the very reason why hearing officers need to be independent of the administrative agency if respondents are to receive at least the appearance of a fair hearing. A respondent will not expect a hearing officer whose procedural and substantive decisions are controlled by the agency to be able to be objective in hearing accusations or ruling upon policies initiated by his or her employer.

6. ROLE OF ADMINISTRATIVE LAW JUDGE

Under the existing Administrative Procedure Act, fact finding is done by an administrative law judge employed by the Office of Administrative Hearings. The head of the administrative agency may either adopt the proposed decision of the administrative law judge or reject it and decide the case itself on the record. The new proposal could change the format:

(1) Each agency head will decide whether the hearing will be conducted by an administrative law judge or by the agency head, itself.

(2) If the agency head conducts the hearing, the agency head will issue a final decision within 100 days after the end of the hearing.

(3) If an administrative law judge conducts the hearing, the administrative law judge renders a proposed decision within thirty days after the end of the hearing. The agency head has 100 days within which to act on the proposed decision. If the decision is not acted upon within that time, it becomes final by operation of law.

(4) A proposed decision or a final decision is subject to administrative review only in the discretion of the agency.

The procedures will create additional flexibility in administrative practice. We recommend that they be supported.

However, a possible result of limiting administrative review may be increased judicial proceedings in comparison with current practice. Now, the general rule is that an appeal to the head of the agency is available as a matter of right. If the Law Revision Commission proposal is adopted, an appeal to the head of the agency would only lie in the discretion of the agency. The reviewing authority would then be limited to a review of the record, except for newly-discovered evidence or evidence that was unavailable at the time of the hearing.

A possible result of this change will be an increased frequency of administrative mandamus proceedings. To the extent that the agency elects not to allow the head of the agency to reconsider a decision, the parties will be left with no recourse other than judicial relief. The Law Revision Commission points out that an appeal to the agency head has "attendant expense." [P. 13.] However, the expense of appealing to the head of an administrative agency is substantially lower than the expense of filing or responding to a petition for administrative mandamus or other judicial proceedings. The Law Revision Commission does not discuss any reasons for its recommended change, nor does it analyze the fiscal impact on the judiciary. Since courts' budgets are being reduced, and their calendars are congested by criminal cases, the State Bar should oppose proposals which force more administrative cases into the courts without administrative review.

7. IMPARTIALITY OF DECISION MAKER

The Law Revision Commission has recommended five excellent additions to the Administrative Procedure Act to assure fairness and due process. But for extensive exceptions, the proposal would require that:

(1) The decision be based exclusively on the record in the proceeding.

(2) Ex parte communications with the decision maker be prohibited.

(3) The decision maker be free of bias.

(4) Adversarial functions be separated from decision making functions within the administrative agency.

(5) Decision making functions be insulated from command influence within the agency.

However, the proposed Act is written so that most requirements which would assure fairness are offset by exceptions which take away such assurances.

Proposed Section 649.120(c) would codify the requirement that the decision be based exclusively on the record of the proceeding. The evidence of record may include the knowledge of the decision maker and other supplemental evidence not produced at the hearing, if that evidence is made a part of the record and all parties are given an opportunity to comment on it. This change is laudable.

Another welcome change is the prohibition against ex parte communications with the decision maker. Under present law, factual information must be given to the decision maker on the record, but the law is not clear whether ex parte contacts concerning law or policy are permissible. The principle which ought to govern administrative proceedings is nicely stated by the Commission: "Fundamental fairness in decision making demands that any arguments to the decision maker on law and policy be made openly and be subject to argument by all parties."

However, the proposed Act would permit the decision maker to obtain advice and assistance from agency personnel. See

Section 648.520, pp. 94-95. This will destroy the fundamental fairness which would have been created by the proposal. In addition, the decision maker would be permitted to discuss "non-controversial matters of practice or procedure" [p. 15]. The proposal does not define this phrase. One person's "non-controversial" matter of "procedure or practice" is another person's controversial matter of substance. To illustrate, the guidelines for disciplinary sanctions of attorneys are contained in the Transitional Rules of Practice and Procedure of the State Bar Court.*/

Thus, after articulating well the reasons for the prohibition against ex parte communications with the adjudicator proposed Act includes expansive exceptions which will swallow the rule. The State Bar should oppose the exceptions. Instead, all communications with the decision maker should be with notice to the other side and opportunity to be heard.

Proposed Section 643.210 contains a succinct statement disqualifying the decision maker for "bias, prejudice, interest, or any other cause provided in this part." The exceptions appear appropriate. Proposed Section 643.130 goes beyond existing law to provide that, if disqualification of the decision maker would prevent the agency from acting, the decision maker is nevertheless disqualified, and another person may be substituted for the decision maker by the appointing authority. These sections are sound and should be approved.

Proposed Section 643.230 codifies procedures for the disqualification of the presiding officer are spelled out. The proposal should be approved, with one exception.

Proposed Section 643.230(d) would prohibit administrative or judicial review of a ruling on a request for disqualification, except on review of the final decision of the adjudicator. If the hearing officer should not have heard the matter in the first place, the decision will have to be vacated, and the matter will have to be reheard. This would be a waste of the resources of the agency and of the respondent. If the adjudicator has a personal interest, bias, or prejudice, it will also usually be impossible for the respondent to prove that the result of the

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*/ Note that the State Bar Court is not subject to the Administrative Procedure Act.

hearing would have differed before a nonpartisan adjudicator. Thus, limiting the right of review to post-decision review would defeat any right of review of the decision or disqualification. The adjudicator will have no incentive to comply with the new rules on disqualification if there is no possibility of being overturned. The right of review should be restored.

Existing statutory and decisional law on the separation of administrative and adjudicatory functions is not clear. See Commission's discussion at p. 16. The proposal attempts to clarify the law as follows:

1. Agency personnel may confer in making preliminary determinations, such as probable cause for issuing the initial pleading. However, proposed Section 643.330(a)(1) destroys the separation of functions by permitting a person who participated in determining that there was probable cause to serve as the presiding officer in the proceeding which results from that person's decision. Thus, the person who decides to prosecute an administrative proceeding may ultimately adjudicate the result of that proceeding. The appearance and likelihood of bias are inherent. This exception should be disapproved.

2. If the adjudicatory proceeding is non-prosecutorial, and a person has been an investigator or advocate more than one year before the time he or she sits as an adjudicator in the case, there is no disqualification. Again, the appearance and likelihood of bias are inherent. To analogize for illustration, if this exception were applied to the judicial branch of government, an assistant attorney general who represented the agency in the hearing was later appointed to the Supreme Court, he or she could decide the appeal from the case on which he or she worked. This exception should be opposed.

Proposed Section 643.330 would also permit an investigator or advocate to give advice to the adjudicator concerning a "technical issue," if the proceeding is non-prosecutorial in character and the advice is necessary for, and not otherwise reasonably available to, the adjudicator, provided that the content of the advice is disclosed on the record, and all parties have an opportunity to comment on the advice. Although this may be necessary in administrative cases that involve specialized, technical issues, an additional element should be required. The

State Bar should recommend that, before seeking or receiving the advice, the adjudicator be required to give notice to the non-agency parties and an opportunity for them at least to be present, so they can hear firsthand what is communicated to the adjudicator.

Proposed Section 643.330(a)(3) would also permit an investigator, prosecutor, or advocate to advise the adjudicator concerning a settlement proposal advocated by that person. Again, the exception should be disapproved. An easy way to bias a judge or a hearing officer is to disclose the contents of settlement negotiations at psychologically important times. The other side could not safely participate in settlement negotiations if the agency's advocate can use settlement proposals or the agency's position regarding them as a means of creating bias by the hearing officer against the respondent. The Law Revision Commission states no rationale for this proposed exception and merely states that prosecutorial personnel "must be able to advise the decision maker" concerning the prosecution's settlement proposals. An unfair proceeding would be the result.

The existence of a driver's license is essential to many people for economic, medical, and other reasons. Under the rationale that driver's licensing cases are so voluminous that separating the prosecution and hearing functions by the Department of Motor Vehicles would "gridlock the system," the Law Revision Commission proposes a blanket exception for the Department of Motor Vehicles when the matter at issue applies to issuance, denial, revocation, or suspension of a driver's license. See Proposed Section 643.320(b). For the reasons stated throughout this report, the exception should not be disapproved.

Proposed Section 643.320(a)(2) prohibits the adjudicator from being a subordinate of an investigator, prosecutor, or advocate in the case. This prohibition is appropriate and should be supported. Anything which promotes the fairness of the proceeding should be built into the act.

8. CONSOLIDATION AND SEVERANCE

The present Administrative Procedure Act contains no provisions for consolidation or severance. Proposed Section 648.120(a) would permit consolidation of proceedings that involve common questions or law or fact. Proposed Section 648.120(b) would permit the agency or the presiding officer to order a separate

hearing of any issue in furtherance of convenience or to avoid prejudice or when separate hearings would be conducive to expectation and economy. These provisions are copied from Code of Civil Procedure section 1048 and should be approved.

Proposed Section 648.120(c) would provide that, if the agency and the presiding officer make conflicting orders for consolidation or severance, the agency's order controls. Given the nature of administrative proceedings, this is reasonable and should be approved.

However, the Comment to proposed Section 648.120 goes far beyond any reasonable interpretation of either Code of Civil Procedure section 1048 or proposed Government Code section 648.120. It states that proposed subsection (a) is sufficiently broad "to enable an agency to employ class action procedures in the agency's discretion." Any suggestion that the provisions for consolidation may permit class action procedures in administrative proceedings under state law should vigorously be opposed by the State Bar. Class actions include difficult technical issues broader than the claim itself. Adequacy of representation, risk of substantial prejudice from separate actions, presence or absence of common questions, adequacy of notice, and many other issues are very difficult to adjudicate, even where rules of evidence apply and due process concerns can be satisfied. In administrative proceedings, the Evidence Code does not apply, even under the proposed new legislation. See proposed Section 648.410(a). Even if an administrative law judge concludes that the preponderance of the evidence supports one side or the other, the administrative agency can overrule that decision. The substantial body of law related to individual rights and duties of represented but non-appearing members of the class and the substance and procedure of class actions could be ignored by the administrative agency.

The proposal is legally incorrect. Class actions are not legitimized by Code of Civil Procedure section 1048. Where class actions are intended, the law says so. For example, Code of Civil Procedure section 382 allows class actions when the question is of common or general interest of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. Civil Code sections 1750 and 1781 create a statutory scheme for class actions in the Consumer Legal Remedies Act. Forum shopping between administrative agencies and

the judiciary will be encouraged by the Comment to proposed Section 648.120.

Regardless of whether one represents plaintiffs or defendants in class action cases, merely suggesting in a comment that class action cases may be prosecuted in administrative agencies is extremely dangerous. The proposed Act should not include such provisions without extensive study. Even if such a study leads to the conclusion that they may be prosecuted in administrative agencies, the procedures must carefully be spelled out in the Act itself, to assure due process in all cases.

9. PROPOSED SECTION 648.150. HEARING BY ELECTRONIC MEANS

This section would incorporate new and different technologies which potentially could save both the agencies and individual participants significant time and expense. We recommend additional procedural safeguards to protect the rights of parties utilizing an electronic hearing. For example, an adequate time period in advance of the hearing should be specified for the exchange of exhibits, so a party will have time to prepare for the hearing and to object to the use of an electronic hearing once they have had an opportunity to review the exhibits. For instance, there may be a challenge to the authenticity of a document, so that only an inspection of the original will solve that issue. In a telephone conference call, the objecting party will not even see the original document. Secondly, particularly in instances where an individual will represent himself or herself without benefit of an attorney, a hearing by telephonic and/or certain other electronic means should be used with caution. A hearing by telephone may favor the educated and/or articulate, whereas if an individual is intimidated by a proceeding or simply inarticulate, a hearing officer who cannot view the demeanor of a participant may wrongfully interpret the timidity as uncooperativeness or dishonesty.

Finally, we would recommend that the method of implementing proposed Section 648.150(b) be given careful consideration. It permits the type of procedural safeguards that we recommend, but any potential savings in time and expense by having an electronic hearing would be lost if a party has to incur the same time or expense to make a preliminary appearance to support or oppose the use of electronics.

If you have any questions regarding these recommendations, please do not hesitate to telephone me.

Very truly yours,

Jerome Sapiro, Jr.

JS:vy

cc: Mark Mazzarella, Esq.
Ms. Janet Carver

(1:9930.03:29)

STATE OF CALIFORNIA

PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Board Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 323-8012

September 23, 1993

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision
Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Dear Mr. Sterling:

The Public Employment Relations Board (PERB or Board) has reviewed the Law Revision Commission's draft model Administrative Procedures Act (APA) and strongly wishes to remain exempt from the APA. We recognize the value of uniform procedures for most administrative agencies whose dispute resolution responsibilities are only incidental to their major program activities. However, a different conclusion is warranted for labor relations agencies, such as PERB and the Agricultural Labor Relations Board (ALRB), whose very purpose is to resolve disputes as a quasi-judicial substitute for the court system. PERB's current regulatory system is much better suited than the proposed APA to adjudicate and promote voluntary settlement of labor law disputes.[1]

The Legislature recognized this difference when it exempted PERB from the current APA. In 1976, when the Educational Employment Relations Act became law, the Legislature was familiar with the Administrative Procedures Act. It chose to exempt the Education Employment Relations Board, as PERB was initially known, from the APA. Rather, it allowed the Board to adopt regulations similar to the procedures of the National Labor Relations Board (NLRB). This choice was based on 40 years of successful adjudication by the NLRB of labor disputes; disputes identical in nature to those to be resolved by the Board. The

[1] Under current PERB procedures the parties to an unfair practice proceeding receive the proposed decision directly from the administrative law judge. The decision becomes final, though nonprecedential, if neither party files an appeal with the Board within 20 days. The model APA provides for a more involved process with considerable delay (section 649.110(b)).

Legislature took the same position regarding APA coverage when it created the ALRB in 1975 and when it added two additional statutes (the Ralph C. Dills Act covering State of California employees in 1977 and the Higher Education Employer-Employee Relations Act covering University of California and California State University employees in 1978) to PERB's jurisdiction.[2]

PERB's ability to resolve disputes outside the framework of the APA has proven essential to successful labor management relations. The foundation of labor relations is the right of employees to choose whether to be represented and, if they select a representative, for that entity to engage in collective bargaining with the employer. As with the NLRB, PERB's representation hearings are not subject to the APA. Establishing bargaining units, conducting elections, resolving challenged ballots and other election-related disputes are a central part of PERB's activities. These activities require timely action to make the collective bargaining process meaningful to the parties. Accordingly, many decisions made during the election process (e.g. election timing and mechanics) are not immediately appealable to the Board. Rather, an aggrieved party may only appeal them as an objection to the election after the election has been conducted. Under the APA these decisions would be subject to appeal immediately, significantly lengthening the time required to complete the election process. In labor relations, delay may well mean the difference between success and failure in protecting the rights of the parties. Delay defeats the very purpose of the statute, denying the benefits of collective bargaining to employees, employee organizations and employers.

Another problem is that the model APA provides for liberal discovery in comparison to that presently permitted before PERB. Unlike witnesses in most administrative matters adjudicated under the APA, witnesses in unfair labor practices are often employees of a party to the hearing. As employees, they are subject to pressures, both overt and subtle, from their employers and/or exclusive representatives, whose conduct is often the subject of the hearing. To protect witnesses, labor relations agencies such as the PERB, the ALRB and the NLRB have purposefully limited discovery. Requiring PERB to comply with discovery under the APA would expose witnesses to harassment, delay the completion of

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[2] In fact, the decisions of one of these quasi-judicial boards influences others as labor law precedents tend to remain consistently applied across both the public and private sector.

hearings and force PERB into the business of protecting witnesses prior to the hearing. These activities would detract from PERB's mission of providing timely and fair resolution of labor disputes.

The model APA also contemplates agencies providing advisory opinions. Again, similar to the NLRB and the ALRB, PERB only acts on unfair practice charges once a party files a charge alleging a violation of the statute. While advisory opinions may be appropriate for other administrative agencies, it runs contrary to the scheme of collective bargaining that PERB oversees. That system provides for private negotiations between the parties operating with a minimum of government involvement. PERB functions not as the direct supervisor of the parties, but rather as a quasi-judicial body which resolves the most persistent disputes where all efforts at settlement between the parties have failed. This system has worked well for almost 60 years for the NLRB at the national level and for almost 20 years in California. To force PERB to now give advisory opinions would destroy this system.

Imposition of the model APA on PERB and its clients is unnecessary. The vast majority of the advocates before PERB are well-versed in the practice of labor law. Processing of election matters and unfair practice hearings is conducted under well understood and accepted regulations. Imposition of new rules under the APA will disrupt a system which has functioned smoothly for all parties for almost 20 years in the California public sector. Such dramatic change will divert scarce PERB resources to drafting new procedures, seeking regulatory relief and responding to court challenges when budget reductions have already seriously strained the agency's ability to perform its mission. The impact on the parties will be equally disruptive, with new procedures to learn and costs to absorb. Thus, any potential value to the affected parties of the new system would be greatly diminished.

PERB believes the exemption is justified and warranted. We have avoided a section-by-section analysis in our response, but are prepared to develop and furnish the Law Revision Commission a detailed list of changes necessary to accommodate the inclusion of labor law adjudication under the auspices of the model APA. We believe that such a change would defeat the original intent to update and make the APA more workable for the agencies who are currently subject to the act.

Should you have any questions, please contact Del Pierce of our staff.

Sincerely,

Sue Blair

SUE BLAIR
Chair

STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA STATE PERSONNEL BOARD
801 CAPITOL MALL • P.O. Box 944201 • Sacramento 94244-2010

September 23, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Re: August 31, 1993 State Personnel Board Comments
Errata Letter

To the Executive Secretary:

The August 31, 1993 memorandum from Chief Counsel Elise S. Rose setting forth the comments of the State Personnel Board (SPB) concerning the tentative recommentations on administrative adjudication by state agencies omits certain language at pages 2 and 3. The "General Comments on Introduction", p. 6 should state as follows:

"Statement that current system limits precedential decision to the issuing agency. This procedure is completely appropriate, especially since the burden of proof may differ with the adjudication (preponderance v. clear and convincing) and the agency standard of review (substantial evidence v. independent judgment). It is a continual challenge to keep current on one's own agency precedents and judicial decisions. It would be nearly impossible to keep informed of, much less be bound by, other agency precedents."

Thank you for the opportunity to submit comments.

Christine A. Bologna
Chief Administrative Law Judge
(916) 653-0544

cc: Chief Counsel Elise S. Rose
Board President Richard Carpenter
Executive Officer Gloria Harmon

CALIFORNIA PERS

Memorandum

California Public Employees' Retirement System

Date: October 14, 1993

File No.:

Law Revision Commission

93

File:

Key:

To: California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

From: **Board of Administration**
Lincoln Plaza, 400 P Street
Sacramento, CA 95814

Subject: ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES; TENTATIVE RECOMMENDATIONS, MAY 1993

Please accept these comments, submitted on behalf of the Public Employees' Retirement System (PERS), regarding the above recommendations. While we regret that these comments have been delayed, we understand that Commission consideration of the recommendations has not yet been completed. We therefore request that the following comments be included in the Commission's deliberations.

Initiating hearings

Pre-existing Government Code section 20133 of the Public Employees' Retirement Law (PERL) provides that PERS, may in its discretion, determine any PERS benefit matter by holding a hearing. However, when we decide to hold a hearing, we must conduct the hearing under the Administrative Procedures Act (APA).[1] This requirement raises several questions in light of the new APA proposal.

[1]Note that Section 20133 specifically refers to the inapplicability of existing Government Code section 11508; the APA proposal, if adopted, would change that number, so section 20133 would need a conforming amendment to insert the proper reference under the new APA.

First, proposed section 642.230 provides that an agency "shall", with certain exceptions, initiate an adjudicative proceeding "on application of a person for an agency decision" for which hearing is required by section 641.110, though not for which hearing is not required under section 641.120. The provisions of sections 641.110 and 641.120 appear to be ambiguous when applied to PERS benefit processing (summarized below). Specifically, would the requirement to hold a hearing apply to all applications for PERS benefits, or only those dissatisfied with PERS' staff's decision regarding that application and who specifically file an appeal requesting a hearing?

PERS routinely receives great numbers of applications for various kinds of statutory retirement and death benefits. (For example, we receive over 175 applications per month for disability retirement alone.) Appropriate operating staff review the applications, receive additional data from the applicant as well as other groups (such as the applicant's employer, examining doctors and rival applicants for the same death benefits, for example), and determine whether to grant or deny the application. When the staff determines to deny an application, it routinely grants administrative appeal rights by which an applicant may request an administrative hearing. If no appeal is filed within the period prescribed by PERS' regulations (i.e. 30 days, unless PERS extends an additional 30 days), the determination becomes final and the case is closed without a hearing.

In these circumstances, it is unclear whether PERS must automatically initiate hearings in all cases of denied benefit applications even absent a specific hearing request. Proposed section 641.120, defining when a hearing is not required, apparently would not apply, since in the above circumstances of a benefit denial PERS is not necessarily issuing a "decision to initiate or not to initiate an investigation, prosecution, or other proceeding" within the meaning of section 641.120.

Second, by regulation (2 Cal.Code of Reg. section 555.1) PERS specifically requires that in order for an applicant to receive a hearing, the applicant must request one in writing filed within 30 days of receiving written notice of appeal rights from PERS (which is normally sent as part of a denial of benefits). PERS' practice is to grant a hearing wherever an applicant complies with this section on a matter within PERS' discretion. However, proposed section 642.220 provides that any "application" for an agency decision includes a request for hearing, even if one is not mentioned in the application. Thus, it would be possible under the

proposed section that PERS would automatically be required to initiate a hearing for all PERS members or projected beneficiaries applying for statutory PERS benefits, even if they did not request a hearing under this section or in any fashion. Since proposed section 612.170 permits waivers of hearing rights, the net effect of the proposal would be to reject the current procedure of holding hearings upon specific request by a party and shift to initiating hearings in every case except where PERS receives an express waiver of the right to hearing. In determining PERS benefits, this proposed shift would create a vast increase in the amount of correspondence, and probably in the number of hearings initiated as well under the new proposal, since most applications are currently decided without the need for hearings.

PERS recommends that benefit applications not be deemed to include a request for hearing. Parties' rights would nevertheless be protected since in PERS practice, the applicant is specifically informed of his or her appeal rights. If for some reason, notice of appeal rights were not given, the applicant is still protected with abundant time to appeal since he or she has three years from the denial of the application to file an appeal. (See Ragan v. City of Hawthorne (1989) 212 Cal.App.3d 1361.)

Hearing deadlines

Additional difficulties arise relative to time required for agency hearing action under the proposal. Proposed section 642.240 requires an agency to make certain responses within 30 days "after receipt of an application for an agency decision", including sending out requests for additional information if needed. Additionally, within 90 days of the later of the receipt of the application or of the response to the agency's timely request for additional information, the agency must either (1) approve or deny the application or (2) commence an adjudicative proceeding.

This section would appear to govern all applications for statutory PERS benefits, since proposed section 610.310 defines "decision" to mean agency action of specific application that determines a legal right or legal interest of a person.

However, in practice, it can take PERS many months to evaluate benefit applications, particularly for various medical-related benefits, since it often occurs that information received generates the need for additional information. For example, after PERS requests and receives

existing medical reports from multiple sources relevant to an employees' disability retirement application, PERS may decide based on that evidence that it must obtain its own medical examination and report. This portion of the process alone can take many months to schedule and to receive PERS' own report.

Thus, if the deadlines found in proposed section 641.130 are measured from the initial application for benefits, PERS will undoubtedly find it impossible to comply with the time frames in most disability retirement applications. In addition, applying such deadlines to PERS may well be unconstitutional if they impair PERS' ability to meet its fiduciary duties as imposed by California Constitution Article XVI, section 17.

Thus, in PERS matters, if time deadlines for initiating hearings are to be enacted for the first time in the revised APA, PERS recommends that the deadlines be measured from an express request for hearing made after PERS' staff determination of benefit rights, and not from receipt of application for benefits or other determination of pension-related rights.

Change of venue

Proposed section 642.430(c) provides for a new motion for change of venue. It is recommended that a deadline be imposed for filing such a motion that is a reasonable and significant amount of time before the hearing, in order to avoid last minute continuances and consequent administrative delays of the hearing. In the alternative, we recommend that language be added to the subdivision prohibiting a change of venue if to grant a change would cause unnecessary delay in the proceedings.

Discovery

Proposed section 645.320 requires that a motion to compel discovery, if any, be filed in most cases within 15 days of the expiration of the discovery response period. However, it may happen that a responding party is unable to obtain the requested discovery within the allowed time and the party may suggest to the requestor that it is still searching for the discovery, inducing the requestor not to file a motion to compel. If the responding party thereafter fails to respond to the discovery request, the requestor will not be eligible to file a motion to compel within the time limit. Such a circumstance may cause requestors to file motions to compel out of an abundance of caution that

may not eventually be required to be heard. However, proposed section 648.610(e) provides contempt sanctions for motions to compel discovery made "without substantial justification". To conserve resources and to clarify the sanction provision, we recommend that either (1) the period for filing a motion to compel be expressly made modifiable by stipulation of the requestor and responding party, and/or that (2) the period for filing motions to compel be measured backwards a reasonable amount of time before the hearing rather than forward from the date of discovery request.

Lastly, PERS **strongly** supports the proposal in sections 645.320 et seq. and 645.430 to place authority for resolving discovery disputes and objections to subpenas with the presiding officer.

Default

Proposed section 648.130(c) permits "the agency or the presiding officer in its discretion" to grant a hearing after a respondent's default. However, it does not provide for resolution of conflicting orders on the issue between the agency and the presiding officer. We recommend that the resolution method in proposed section 648.120(c) [agency's order prevails] be adopted on the issue of granting hearings after default under proposed section 648.130(c).

Burden of proof

Proposed section 648.310 places the burden of proof on the "proponent of a matter". This provision is unclear as applied to "voluntary reinstatement" cases; that is, cases in which a disability retiree wishes to reinstate from disability retirement to active employment. State agencies are required by the PERL to re-employ their former state employee upon a PERS finding of lack of continued disability. Under proposed section 648.310, would the burden be on the retiree to prove he or she is currently ineligible for disability retirement and therefore has a mandatory right to reinstatement to employment, or would the burden be on the employer to prove that the former employee is still entitled to disability retirement and is therefore ineligible for reinstatement to employment? Existing case law is unclear, and the proposal does not clarify it.

Ex parte communications

Proposed section 648.520(a) (together with section 649.230(d)) provides that there shall be no communications, without opportunity of parties to participate, between the

presiding officer, reviewing authorities, and employees of the agency. Subdivision (b)(4) excepts circumstances where the "communication concerns a matter of procedure or practice that is not in controversy." Given the broad proscription found in subdivision (a), the section perhaps could be usefully clarified by expanding subdivision (b)(4) to except communications not related to the subject matter of the administrative litigation.

Thank you for considering our views. If you have any questions, or require additional information, please contact Richard B. Maness, Senior Staff Counsel, at (916) 326-3670.

RICHARD H. KOPPES
General Counsel

RBM:suea

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November 19, 1993

California Law
Revision Commission
4000 Middlefield Road., Ste D-2
Palo Alto, California 94303

Attn: Nathaniel Sterling, Esq.

Re: Proposed Government Code §643.320(b)

Dear Mr. Sterling:

The provisions of subdivision (b) making separation of powers requirements inapplicable to the Department of Motor Vehicles regarding drivers licensing hearings must not be enacted.

The Department of Motor Vehicles is, without a doubt, the most abusive administrative agency in California.

The stated rationale for excluding the Department of Motor Vehicles appears in the comments to the proposed code section as follows: ". . . (S)ubdivision (b) recognizes the personnel problem faced by the Department of Motor Vehicles due to the large amount of drivers licensing cases." This "personnel problem" was brought about by the Department of Motor Vehicles via its requests for legislation greatly expanding the ability of the Department of Motor Vehicles to withhold, revoke or suspend a drivers license. It is further exacerbated by the Department of Motor Vehicles' own administrative rules limiting the ability of one to maintain the privilege to drive. At the same time, the Department of Motor Vehicles rates for every form of tax, whether it be for issuance of a drivers license or for renewal of registration, has increased at a rate far beyond the rate of inflation. Surely the Department of Motor Vehicles has the ability to cure the alleged "personnel problem".

It boggles the mind that the California Law Revision Commission would, even for one moment, even consider letting the Department of Motor Vehicles escape this much needed legislation.

Wherefore, on behalf of myself and all persons in possession

of a California drivers license, may I respectfully request that subdivision (b) of §643.320 be deleted in its entirety.

Respectfully submitted,

Dale E. Wood

DEW:cjs/CLRC.DEW
cc: Ed Kuwatch
CACJ/Attn: Legislative Committee

State of California Business, Transportation and Housing Agency

Memorandum

Date : November 24, 1993

To : Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

From : **Department of Motor Vehicles**
Legal Office, E-128
P. O. Box 932382, Sacramento, CA 94232-3820

Subject : Comments to Proposed Revisions on Administrative Adjudication

The Department of Motor Vehicles has reviewed the Commission's recommendations. We have concern over one particular section:

643.320(b)

Footnote comment on (b) does not coincide with the language of the proposed section. For example, in school bus certificate hearings, the hearing officer employed by Department of Motor Vehicles submits a proposed decision to the Certificate Action Review Board. This Board is comprised of a representative from the California Highway Patrol, the Department of Education and the Department of Motor Vehicles.

The department conducts other certificate hearings, such as ambulance driver certificate. These cases, like school bus driver certificate cases, are heard by a Department of Motor Vehicles' hearing officer who proposes a decision to an independent board.

The manner in which the exemption is worded leaves ambiguity in whether special licensing endorsements or license classification hearings would fall within the exemption. Many driver licensing actions result in a "restriction" on driving, i.e., daylight operation, specific area, etc.; removal or addition of special endorsement, i.e., passenger, hazard material transport, etc.; or classification changes, i.e., Class A to Class C. The department's position is that all driver licensing cases fall within the exemption based upon volume of cases and additional cost to add personnel to provide a separate presentation.

The citation of Division 6 (commencing with Section 12500) of the Vehicle Code in proposed Section 643.320(b) overlooks suspensions for failure to provide financial responsibility under Division 7 (commencing with Section 16000) of the Vehicle Code.

Please note also that the department conducts seizure and sale hearings regarding delinquent registration fees on vehicles. See Vehicle Code section 9801.

If you have any questions, please call me at 916-657-6469.

Sincerely,

Marilyn Schaff

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Chief Counsel

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January 27, 1994

Nathaniel Sterling, Esq.
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Re: Comments on Tentative Recommendations to Amend the Administrative Procedures Act

Dear Mr. Sterling:

I am writing on behalf of the California Attorneys for Criminal Justice with comments on the California Law Revision Commission's proposed amendments to the Administrative Procedure Act.

I am a member of the Board of Governors of the California Attorneys for Criminal Justice, Co-Chair of that organization's DUI/DMV Committee and have been in the private practice of criminal law since 1973. A large percentage of my practice consists of defending individuals who are accused of driving under the influence of alcohol. I also have extensively represented clients in Administrative Per Se hearings before the Department of Motor Vehicles.

The comments that follow are directed toward the failure of the tentative recommendations to the Administrative Procedure Act to include such hearings under the purview of the Administrative Procedure Act. A brief history of the Administrative Per Se Process and the policies of the Department of Motor Vehicles in conducting such hearings is required to understand the important and basic need to include such hearings under the purview of the Administrative Procedures Act.

The laws which created Administrative Per Se hearings were enacted with an effective date of July 1, 1989. The statutes require that an individual drivers license be suspended for <u>all</u> purposes after an arrest for driving under the influence if the driver's blood alcohol at the time of the driving exceeds .08% or if the driver refused to take a chemical test upon arrest. The suspension is required to go into effect thirty days after the arrest, with the duration of the suspension varying depending upon the driver's history. A driver with no prior convictions for driving under the influence will receive a mandatory four month

suspension for driving with a blood alcohol level in excess of .08% will receive a one year suspension if the driver refused to take a chemical test. A driver with prior convictions will receive a longer suspension or revocation with a minimum suspension being at least for one year in duration. Please note that all of these suspensions are for all purposes and the driver is not even eligible for a restricted license that would allow driving to, from or during the scope of employment. Further, the suspension is not related to a conviction for driving under the influence of alcohol, but rather will go into effect thirty days after the driver's arrest.

The result of this process is that hundreds of thousands of California motorists have had their license suspended since the law went into effect in 1989. This type of suspension has had a catastrophic and traumatic economic effect as a result of loss of employment. Further, there is a requirement that once a license is suspended under these sections, that the driver must provide proof of insurance by filing an SR-22 form with the Department of Motor Vehicles prior to reissuance of a driver's license. This requirement places a heavy burden on the licensee and it is estimated by the Department of Motor Vehicles that as many as 150,000 drivers, who have completed the suspension, have not applied to have their licenses reissued. Further, once a driver's insurance company finds out about the suspension, the insurance company most likely will cancel the driver's insurance policy during his term due to the fact of the suspension. In short, the Administrative Per Se law has had drastic adverse economic consequences which, in many cases, far ouweigh the consequences of a criminal conviction.

Therefore, it seems fundamental that the State of California should provide a fair and impartial hearing to those drivers who desire to contest the factual basis for the suspension. Unfortunately, the present process lacks fundamental fairness and in many instances the result of a hearing is a foregone conclusion. This is because the Department of Motor Vehicles is allowed to conduct their own hearings. The hearing officer, under current law, is allowed to present the Department's case either by documentation or by examining witnesses, is allowed to rule on the driver's objections and then make a decision. I have never had a hearing officer that was an attorney and most have worked their way up through the Department of Motor Vehicles to this position. Consequently, most, but not all, Hearing Officers have a strong bias in favor of sustaining the Department of Motor Vehicles position. This is borne out by the Department of Motor Vehicles' own statistics which I enclose herein as an exhibit. During the fiscal year 1992/1993 the Department of Motor Vehicles held 20,587 Administrative Per Se Hearings and 16,920 suspensions were sustained following hearings. The result is that hearing officers

found in favor of the Department of Motor Vehicles in slightly more than 82% of all hearings held. The figures for the fiscal year 1991-1992 show a higher percentage of decisions in favor of the Department. Specifically, there were 20,413 hearings held in that time period and in 17,818 cases or, in excess of 87% of the cases, the suspension was sustained.

The Office of Driver Safety routinely directs and advises hearing officers on legal developments and the Department policies and positions as to how the hearing should be conducted and decided. There is an obvious conflict of interest between the Office of Driver Safety whose primary goal is to take action to promote safety on the roadways and the Hearing officers, whose primary goal should be to guarantee both sides a fair hearing.

In summary, the current system is fundamentally unfair, almost to the point of denying due process of law to motorists, by allowing hearing officers, who are employees of one of the parties and controlled by the Office of Driver Safety to present their employers case and then rule on the case.

I would now like to comment on the Law Revision Commission's Tentative Recommendations. First, we feel strongly that all Administrative Per Se Hearings should be subject to the Administrative Procedures Act.

In this regard, I call your attention to the Commission's discussion of expansion of the Central Panel of Administrative Law Judges that commences on page 10 of the Introduction to the Tentative Recommendations. Therein, the Commission lists six reasons against broader use of the Central Panel. The reasons listed for not broadening the use of the Central Panel demand that Administrative Per Se hearings be removed from the Department of Motor Vehicles and be heard by Administrative law judges.

First, as indicated in this letter, there is massive evidence of fundamental unfairness to the hearings as they are currently held and certainly perception of unfairness to those unfortunate enough to participate in such hearings.

Secondly, the hearing personnel are not functioning appropriately inasmuch as many see their role not as an independent arbiter, but rather as an employee of the Department of Motor Vehicles whose purpose is to find a way to sustain the suspension.

Third, the Department of Motor Vehicles is not a "purely adjudicating agency," and consequently there is a real need to make the judges independent.

Fourth, the cost of further centralization could be offset by raising the reinstatement fee. Most anyone that is participating in the current system would agree strongly that the value of a fair and impartial hearing is worth having drivers pay higher fees to have their licenses reissued.

Fifth, the current hearing officers are really not familiar with the technicalities of the area as most are untrained non-legal personnel. Further, the policies of the agency that the hearing officers are familiar with are those which the Office of Driver Safety wants enforced. This current practice undermines the basic fairness of the hearing and there is not a need for the hearing officer to be familiar with these type of policies to make fair and impartial hearing decisions.

Sixth, the mission of the Department of Motor Vehicles is not so unique so as to have the hearings handled in a house by the Department of Motor Vehicles. The issues in these hearings are always the same, and the real problem is that they are not being fairly decided.

In summary, using all of the Commission's criteria, it is abundantly clear that Administrative Per Se hearings should be subject to the Administrative Procedures Act for all the above reasons stated above.

Secondly, it is our position that the Department of Motor Vehicles should be subject to the provisions of Section 643.320 of the proposed Administrative Procedures Act. That section, as currently written, specifically excludes the Department of Motor Vehicles in Subsection B. The Department of Motor Vehicles should be subject to the separation of functions requirement for all the reasons indicated in this letter.

Finally, should the Law Revision Commission decide not to include Administrative Per Se hearings within the administrative procedures act, then we strongly recommend that the Commission enact a provision that would require the Department of Motor Vehicles to establish an Office of Hearing Officers and take control and authority of hearing officers away from the Division of Driver Safety. The office which controls hearing officers should only be interested in giving a fair and impartial hearing to both sides and not have an interest in furthering the Department of Motor Vehicles policies regarding driver safety. Additionally, we recommend that once a separate division is established to control such hearings, that the Commission take steps to insure that an independent prosecutor present the Department's case to the Department of Motor Vehicles Hearing Officer.

I hope that you will take the appropriate action to create fundamental fairness in this important area. I am interested in working with you further on these issues and if I can assist in any way, please let me know.

Very truly yours,

HUTTON & SIMPSON

Richard A. Hutton

RAH:jz
Encl.
cc James S. Thomson, President
California Attorneys for Criminal Justice

cc Michael Rothschild, Board of Governors
California Attoneys for Criminal Justice

cc Kay Sunday, Board of Governors
California Attorneys for Criminal Justice

OFFICE OF THE DIRECTOR
DEPARTMENT OF MOTOR VEHICLES
P. O. BOX 932328
SACRAMENTO, CA 94232-3280

August 25, 1993

To All Users of Department of Motor Vehicles Reports and Statistics

Attached for your information is a copy of our third fiscal year summary of administrative per se (APS) process measures entitled ***California Administrative Per Se Facts.*** This fact sheet describes the APS law and summarizes the number of license suspensions and revocations by relevant driving-under-the-influence offender categories. These figures are from fiscal year 1991/1992 and fiscal year 1992/1993. We also produce an annual calendar-year summary of the same measures which is available, at no charge, upon request. The calendar-year summary or additional free copies of the attached fiscal-year summary can be obtained by contacting our Research and Development Section:

Department of Motor Vehicles
Research and Development Section, F-126
2415 First Avenue
Sacramento, CA 95818

Phone: (916) 657-7799

FRANK S. ZOLIN
Director

Attachment

Administrative Per Se Process Measures

Prepared by DMV Research and Development Section 8/25/93

	FY 91/92	FY 92/93	% change
• Administrative per se (APS) documents received from law enforcement†	276,359	235,502	-14.8
• APS documents returned for correction†	15,025	13,025	-13.3
• Total APS actions taken (including actions later set aside)[1]	263,639	231,491	-12.2
→ Suspensions	253,830	223,481	-12.0
→ Revocations	9,809	8,010	-18.3
• Total APS actions set aside	13,816	12,548	-9.2
→ Suspensions set aside	13,578	12,373	-8.9
→ Revocations set aside	238	175	-26.5
• Net total APS actions taken (excluding actions later set aside)	249,823	218,943	-12.4
→ Suspensions	240,252	211,108	-12.1
→ Revocations	9,571	7,835	-18.1
• Of net total APS actions taken, suspension/revocation order served by:			
→ Law enforcement	222,284	197,063	-11.3
→ DMV	27,537	21,878	-20.6
→ Source unknown	1	2	100.0
APS Actions by Offender Status/Occupation[2]			
• Total APS actions, noncommercial drivers	242,697	212,753	-12.3
• Total commercial driver license (CDL) APS actions taken	7,126	6,190	-13.1
• APS suspensions for drivers with no prior DUI convictions[3]	172,083	151,752	-11.8
• → 4-month license suspensions	151,857	133,614	-12.0
• → 30-day suspensions plus 3-month restrictions	5,855	5,356	-8.5
• → First-offender chemical test refusals	10,068	8,999	-10.6
• → CDL first offender suspensions/restrictions	4,303	3,782	-12.1
• Total APS actions, taken for drivers with prior DUI convictions	77,740	67,191	-13.6
• → Suspensions	68,169	59,355	-12.9
• → Revocations	9,571	7,836	-18.1
• Number of APS suspensions of commercial drivers in commercial vehicles	41	38	-7.3
• Number of APS revocations of commercial drivers in commercial vehicles	0	0	—
Total APS Hearings (BAC or Refusal):			
• Total hearings scheduled	24,419	24,497	0.3
• Total hearings actually held and/or completed[4]	20,413	20,587	0.9
• Total suspensions sustained or upheld following a hearing[5]	17,818	16,920	-5.0
APS Chemical Test Refusal Process Measures:			
• Chemical test refusal documents received from law enforcement†	21,012	NA[6]	—
• Total APS refusal actions taken (including actions later set aside)	20,448	17,454	-14.6
→ Suspensions	10,639	9,445	-11.2
→ Revocations	9,809	8,009	-18.4
• Total APS refusal actions set aside	776	619	-20.2
→ Suspensions set aside	538	444	-17.5
→ Revocations set aside	238	175	-26.5
• Net total APS refusal actions (excluding actions later set aside)	19,672	16,835	-14.4
→ Suspensions	10,101	9,001	-10.9
→ Revocations	9,571	7,834	-18.1
• APS refusal suspensions for subjects with no prior DUIs	10,068	8,999	-10.6
• APS refusal actions for subjects with prior DUIs	9,604	7,836	-18.4
→ Suspensions	33	2	-93.9
→ Revocations	9,571	7,834	-18.1
• APS refusal hearings scheduled[7]	3,287	2,988	-9.1

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January 28, 1994

Nathaniel Sterling, Esq.
California Law Revision Commission
4000 Middlefield Rd., Ste D-2
Palo Alto CA 94303

Re: Comments on Proposed Amendments to Administrative Procedure Act

Dear Mr. Sterling:

I am writing both individually and on behalf of the California Deuce Defenders Association with comments on your agency's proposed revisions to the Administrative Procedure Act.

I am the author and publisher of *California Drunk Driving Law*, a comprehensive reference to the law of drunk driving in California. This 800-page quarterly-updated publication currently has about 1350 subscribers. I have practiced law for nearly 15 years, with my practice limited almost exclusively to drunk driving cases. I have lectured at about 40 lawyer's continuing education seminars over the past 11 years; probably more than any other lawyer in this state. I am also a member of the editorial board of the *DWI Journal*, a national journal. I am considered the state's leading authority on the subject of drunk driving law. In addition, I am the founder and a past president of the California Deuce Defenders and a past president of the Berkeley-Albany Bar Association.

California Deuce Defenders is a statewide association of attorneys who specialize in the defense of persons accused of drunk driving. Founded in 1988, the organization now boasts over 125 members throughout the state.

The California Deuce Defenders and I are concerned with matters related to the California Administrative Procedure Act because we do thousands of administrative hearings each year before the California Department of Motor Vehicles (D.M.V.). Somewhere in the neighborhood of 300,000 motorists have their driving privileges suspended or revoked by the D.M.V. each year. Most of these actions are taken under the authority of Veh. C. §13353.2, the Admin Per Se Excessive B.A.C. statute.[1] Undoubtedly, the

[1] It requires a suspension of four months for a first offender, or one year for anyone with a prior conviction, for driving with a blood alcohol concentration (B.A.C.) of 0.08% or more.

D.M.V.'s driver's license suspension and revocation hearings make up the single largest group of administrative adjudicative actions in the state.

My attention was directed to your agency's proposed revisions to the A.P.A. quite by accident. In early August I saw an announcement in the *San Francisco Daily Journal* that the TENTATIVE RECOMMENDATION was available for public comment. I ordered it, received it, set it aside in a pile of things to look at when I got a chance. Later, on November 16, 1993, I picked it up to look at it without knowing what it was. Then I quickly realized the significance of the document, and was startled to see that the D.M.V. had secured an exemption from the new A.P.A.'s most important section: the separation of prosecutorial and adjudicative functions set forth in §642.320.[2]

I immediately contacted the California Public Defender's Association and the California Attorneys for Criminal Justice. Neither had heard of the matter prior to my bringing it their attention. Thus, in light of the foregoing facts regarding the number of administrative adjudicative matters handled by the D.M.V., the TENTATIVE RECOMMENDATIONS were drafted with no input from anyone representing major non-governmental interests in the most common type of administrative adjudicative hearings that are conducted. I communicated my thoughts on all this to you the same day, and you invited comments and told me of an informal deadline of February 1, 1994. Thus, I'm submitting these comments to you after the close of the official comment period on August 31, 1993.

As I stated earlier, our primary concern is with the fairness of D.M.V. hearings. Shortly after the passage of Veh. C. §13353.2 the number of administrative hearings on driver's license suspensions skyrocketed. Whereas previously, only persons who refused chemical tests were suspended administratively (under Veh. C. §13353), the new statute added administrative suspensions[3] for nearly all drivers. Also included was the right to a hearing to contest the action, as had been the case for those accused of chemical test refusal.

But, something else also went up dramatically: the number of writs under C.C.P. §1094.5 contesting the agency decision. Whereas, under the old provisions, one rarely found cause for a

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[2] Subdivision (b) exempts the D.M.V. from the provisions of subdivision (a).

[3] These actions are completely separate from the post-conviction suspensions where there is no right to a hearing.

writ challenging a chemical test refusal suspension (I did fifty to seventy-five hearings with only two writs in 12 years), suddenly writs challenging excessive B.A.C. suspensions became routine.

The primary cause of this dramatic turn-around was the increased complexity of the new statutes and the failure of the D.M.V. to meet this challenge with well-trained[4] and independent hearing officers. Instead, the D.M.V. kept the hearing officers under the direct authority of the head of the Driver Safety Division, the prosecutorial entity in these matters, and rejected a plan to give them more independence by putting them in the legal division.[5] Predictably, the Driver Safety Division saw them as dutiful subordinates charged with the duty to carry out department policy rather than as independent adjudicators carrying out state law.[6] All this led to the generally recognized perception that the hearings were nothing but a sham, conducted by dutiful clerks carrying out the policies of the prosecutorial interests that employed them. The universal outrage translated into an explosion of writ litigation.

The D.M.V. began acknowledging the problem almost immediately. And at one point, the Attorney General's office announced publicly that it would not represent the D.M.V. anymore in the writ proceedings, due to lack of man/person power to handle all of them. In response to repeated complaints about unfair and incompetent hearing officers, in the Fall of 1992 the D.M.V. contracted with Richard Guarino, an acknowledged administrative adjudication expert,[7] to retrain their entire cadre of hearing officers. He conducted the retraining seminars in the Spring of

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[4] It would be unfair to place the blame for this on the D.M.V. itself. Officials there did the best they could with the limited funds available. The governor had drastically reduced the appropriation for implementing the program. Ironically, in the long-run that decision probably cost more money.

[5] This would not would have given them adequate independence either, but it would have been a vastly better choice.

[6] There are no relevant administrative regulations.

[7] An attorney, and Cal. State Sacramento professor, Mr. Guarino has experience training administrative hearing officers in the essentials of their work. At one point in his career he retrained numerous welfare hearing officers and assisted in the reform of the welfare hearing process. The main problem there, he said, was that the hearing officer's supervisors were the prosecutors of the cases.

1993. But the problem remains, and apparently the retraining has not worked. D.M.V. officials confirmed this assessment to me as recently as November, 1993.

The essence of the problem, according to Guarino, is that the hearing officers see their primary duty as protecting public safety, rather than as hearing officers simply carrying out the law. Many of them worked their way up from driver's license examiners, riding in cars with people taking their driving test. Only a small minority have any formal legal education. They see themselves as simply employees of the Driver Safety Division, carrying out Department policy protecting the highways from drunk drivers. As such, their loyalty is to their employer, rather than the law, and it shows.

My colleagues, the drunk driving defense attorneys of this state, overwhelmingly agree that these hearings are not fair, that they are a sham and a crock.[8] I get phone calls and letters on an almost daily basis from attorneys complaining about these sham hearings. (A very typical example, that was faxed to me as I wrote this letter, is attached as Exhibit A.) I could not begin to list all the complaints I've heard. Suffice it to say that there is an overwhelming perception, well justified, that these hearings are not conducted by independent, fair and impartial hearing officers.

One final example of the problem: Two bills (Stats. 1993, Chapters 899 (SB 689) and 1244 (SB 126)) became operative January 1, 1994. They require a one-year driving privilege suspension for persons under the age of 21 who test 0.01%[9] or more on a *preliminary alcohol screening device* where such a device is *immediately available*. The clear intent of this statutory scheme is that young persons stopped for reasons other than impaired driving, that do not seem impaired by alcohol, be tested roadside, with minimal delay, to determine if they have been drinking alcohol. But many police officers do not carry the required Preliminary Alcohol Screening Device (P.A.S.) and for that reason, an immediate roadside test will not be possible in many cases.

Rather than take this state law and the legislatures intent at its face value and simply enforce it as directed, the Driver

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[8] Of course, there are a exceptions in few district Driver Safety offices where the local manager has done a better job of getting the message of competence and fairness to his subordinates.

[9] That's one-eighth the 0.08% limit applicable to persons 21 or over.

Safety Division decided to interpret it to permit a test at the police station or jail, as long as it occurs within three hours of driving. Clearly, this was not the intent of the legislature. That body apparently felt that driver safety was adequately protected by requiring a prompt roadside breath test or none at all.

When I first heard of the plan to expand the scope of the statute to tolerate detentions as long as three hours I asked D.M.V. officials how they intended to implement the policy. I was told that they planned to simply send a memo to the hearing officers directing them to rule that way in accordance with department policy. The unfairness of doing that had not entered their minds until I pointed it out. At first they were somewhat incredulous. They felt they weren't interfering in the hearing process, but instead they were just directing their employees how to protect public safety. That's certainly to be expected of a zealous prosecutor. And it's also predictable that a prosecutor who employs the judge would not even think about any impropriety in telling the judge how to rule in pursuit of so noble a cause. Only after heated discussions with them and the D.M.V. legal office did they understand that, in this one instance, they ought not direct the hearing officers how to rule on the fair interpretation of state law.[10]

So what do to about all this? Certainly the D.M.V ought not be exempt from the provisions of the proposed §642.320. But we think more is required: These hearings ought to be conducted by a Central Panel of administrative law judges with a loyalty to the law rather the D.M.V. This position is well-supported by a look at the factors listed under the heading EXPANSION OF CALIFORNIA CENTRAL PANEL, on page 10 of the INTRODUCTION to the TENTATIVE RECOMMENDATION.

The first factor relates directly to unfairness and the perception of unfairness and states that a Central Panel is not needed because unfairness and the perception of it are not a problem. But in the D.M.V.'s case there is abundant evidence of unfairness and certainly a widespread and well-founded perception of unfairness surrounding hearings on D.M.V. license suspensions.

The second factor relates to the competence of hearing officers. The introduction of the statutory scheme for excessive B.A.C. suspensions greatly increased the complexity of issues at D.M.V.

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[10] There probably is some need for a higher authority to tell lay hearing officers how to interpret cases and statutes. Our objection is that the higher authority ought not also be the prosecutorial authority.

hearings. The new chapter on this topic in my book is 108 pages long. Even at that, many issues are only given limited coverage. A score of appellate opinions have been published, including one from the Supreme Court. I have almost daily contact with attorneys who have difficulty comprehending it all. Yet the present regulatory framework expects lay hearing officers to not only understand it, but to competently master it and act as judges on the facts and law. That's simply asking too much of people lacking a law school education. Contrary to the assumption mentioned in the discussion of this factor in the TENTATIVE RECOMMENDATIONS, these hearing officer personnel do not appear to be functioning properly.

Third, the D.M.V. is not a primarily adjudicative agency like the W.C.A.B. It is primarily a licensing agency.

Fourth, the D.M.V. claims the increased cost would prohibit transferring the hearing officer function to another entity. But it's not clear that there would be any increase in cost if the transfer is successful in achieving its aims. For one thing, an increase in fairness and competence would greatly reduce the expensive litigation we are now experiencing. And in any event, any increase could be passed on to licensees seeking reinstatement through the present provisions allowing the D.M.V. to assess an amount that covers the agency's costs. Presently the reinstatement fee is $100.00. Surely no one would object to paying somewhat more than that for a fair hearing. In comparison, the economic cost of losing one's right to drive is staggering. Hundreds of thousands of Californians have lost their jobs and all that befalls them along with that because they lost the right to drive.

As for the fifth factor, I can't agree with its premise:

- Exhibit A is a good and typical example of how the D.M.V. uses its power to control the timing of hearings to its unfair advantage.

- As for familiarity with the technicalities, that's a major part of the problem. These lay persons don't understand the complex legal issues involved.

- Further, the whole idea of eliminating bias for one side or the other embodies the concept that the hearing officer ought not be implementing *the policies of the agency*, but rather, following the law as it is written by the legislature. (There are no administrative regulations involved.)

Sixth, a review of the factors related to the D.M.V. makes an abundantly clear case for the need for a Central Panel. In addition, since D.M.V. license suspension hearings are the most common administrative adjudicative hearings there are, there's no problem with generalizing. They <u>are</u> the generalized hearings.

I hope you find my comments of interest and import. Please let me know if I can be of further assistance. And please include me on the mailing list for further announcement and communications on this project.

Sincerely,

ED KUWATCH

cc: Richard Hutton, C.A.C.J. Legislative Committee
Gail Dekreon, President, California Deuce Defenders
Marilyn Schaff, Chief Legal Counsel, D.M.V.

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"A Reasonable Doubt for a Reasonable Fee"

fax memo

to:	fast eddie
fax:	707-459-0966
from:	mjs
date:	1/25/94, 15:25 hrs.
re:	dmv hearing woes

dear eddie:

i have a situation brewing, and i wish your input on what to do.

i have a client who was stopped for erratic driving by a cop who obtained his initial information from a citizen. he then summoned another cop for the fst's and to make the arrest.

at the dmv hearing, the department did not offer anything by way of p.c. for the stop, so i objected and made my record, which initially the hearing officer didn't quite understand. finally he grasped the situation, and ordered a continuance so he could subpoena the necessary witnesses. the dmv called a few days later and set up a new hearing date of today.

this am, they called and informed my secretary that they had forgotten to subpoena the witnesses, so they would be canceling the hearing and setting up a new one. i never received the message, but even if i had, i would not have acquiesced. so i showed up and when i told him that the department had not sustained its burden and i wanted my client's driving privilege reinstated, the hearing officer didn't quite understand my point (or at least claimed he didn't). he wasn't even going to allow me to make my record until i insisted.

in any event, he denied my request to set aside the order of suspension and set a new hearing date.

is there something i should do at this point?

thanks for looking out for souls like me.

227

EXHIBIT A

HENRY P. RUPP III
ATTORNEY AT LAW
CERTIFIED SPECIALIST IN CRIMINAL LAW
CALIFORNIA BOARD OF LEGAL SPECIALIZATION

RANCHO CUCAMONGA OFFICE:
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February 4, 1994

NATHANIEL STERLING ESQ
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road., Suite D-2
Palo Alto, California 94303

Re: Comments on Proposed Amendments to Administrative Procedure Act

Dear Mr. Sterling:

I have reviewed your tentative recommendation of proposed revisions of the California Administrative Procedures Act. Frankly I am amazed that the Department of Motor Vehicles is proposed to be exempt from Section 642.320 (the separation of prosecutorial and adjudicative functions).

The DMV is conducting the relatively newly enacted Administrative Per Se (APS) proceedings with their employees, also know as "hearing officers". Not only do these hearings provide the last defense of a person's privilege to drive after being accused of driving under the influence, the hearings are probably the only contact a licensee has with an administrative hearing in his or her lifetime.

My point is that the vast majority of my clients think these hearings are a sham. I take part in almost a dozen APS hearings a month, far more than any other attorney I know. I have become very adept at these hearings and I can tell you that though I do a very good job defending my clients in them, almost all of my clients think they are a joke.

Why bother with such a sham at all? It is simply degrading the public's view of the law. This is part of the reason why there are now hundreds of thousands of persons now driving without a license in California. Many people feel participation in the system as it is now is useless. Who can blame them when their "impartial" hearing officer draws a paycheck from the same agency attempting to suspend their license?

Your commission can help to avoid this slide into total anarchy. The public will not seek redress if they feel such hearings are unwinnable. The cost of simply filing a writ to appeal a DMV decision is almost two hundred dollars (I have done almost fifteen of these writs pro bono in the last two years) so that should tell you how I feel about these "fair" DMV hearings.

You must do all you can to prevent the DMV from continuing with its present system. The APS hearing officers should be attorneys. They should be employed by an agency other than the DMV.

Please call upon me to assist you if you need further input.

Sincerely,

Henry P. Rupp III
Attorney at Law

HPR:sr
cc: Frank Zolin, Chief of Department of Motor Vehicles
Marilyn Schaff, Chief Legal Counsel, DMV